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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF
VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF
RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED OCTOBER 9, 1984
PROBABLE JURISDICTION NOTED DECEMBER 10, 1984

Volume I

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-571

HARRY N. WALTERS, ADMINISTRATOR OF
VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF
RADIATION SURVIVORS, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT
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NATIONAL ASSOCIATION OF RADIATION SURVIVORS,
A CALIFORNIA NON-PROFIT CORPORATION;
SWORDS TO PLOWSHARES VETERANS RIGHTS
ORGANIZATION,
A CALIFORNIA NON-PROFIT CORPORATION;
DON E. CORDRAY, AN INDIVIDUAL;
ALBERT R. MAXWELL, AN INDIVIDUAL;
REASON F. WAREHIME, AN INDIVIDUAL;
DORIS J. WILSON, AN INDIVIDUAL, PLAINTIFFS,

v.

HARRY N. WALTERS, ADMINISTRATOR OF
THE VETERANS ADMINISTRATION;
THE UNITED STATES OF AMERICA;
THE VETERANS ADMINISTRATION;
PAUL D. ISING, DIRECTOR, SAN FRANCISCO
REGIONAL OFFICE, THE VETERANS ADMINISTRATION,
DEFENDANTS.

38 USC 3404-3405: Challenge to its Constitutionality under
the First and Fifth Amendments

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1983

Apr 13

- 1 COMPLAINT: summons issued.
- 2 Plaintiffs' Ex Parte Motion for Expedited Discovery, Order Shortening Time and Order Fixing Place of Deposition.
- 3 —Memorandum of Points and Authorities in Support of #2.
- 4 —Affidavit of Michael F. Ram in Support of #2.
RECEIVED: Proposed Order granting #2.
- 5 Plaintiffs' First Request to Produce Documents for Inspection and Copying.
- 6 ORDER setting Status Conference: 7/25/83 at 9:30 am. Clerk
- 18 7 Letter from Plaintiff's counsel re Plaintiffs to present Motion for Order Expediting Discovery, Shortening Time and Fixing Place of Deposition to MHP on 4/21/83 at 9:30 am.
- 19 8 Defendants' Opposition to Early Discovery and Counter-motion for a Protective Order.
RECEIVED: Proposed Order Staying Discovery.
- 9 Plaintiffs' Proof of Service for #2, #3, #4, #5, and #6, upon Defendants, by personal delivery on 4/13/83.
- 21 10 MINUTES; (c/r Vivian Pella) Plaintiff's Motions for Order Expediting Discovery, Shortening Time & Fixing Place of Deposition heard.
Discovery Schedule:
5/16/83—Response to remaining outstanding document request.
10 days later—any discovery re any supplemental written request. Declaration necessary.

4/28/83—document addressing those issues due.

5/5/83—Government response due.

6/3/83—Deposition to begin.

- 26 11 ORDER Regarding Discovery Schedule: Defendants to respond to Plaintiff 1st Set of Interrogatories by 5/16/83. Plaintiffs may make supplemental request for production of documents. Depositions of T.A. Verrill and Puuaul Ising to commence 6/3/83. Plaintiffs to file declaration by 4/28/83 designating VA officials who must be deposed. Defendants to file by 5/5/83 response to Plaintiff's declaration re VA officials to be deposed. MHP
- 28 12 Plaintiffs' Supplemental Declaration of Gordon P. Erspamer in Support of Plaintiffs' Motion for Expedited Discovery, Order Shortening Time and Order Fixing Place of Deposition.
- May 2 13 Summons on Return: executed on 4/13/83, to U.S. Atty, personal service
- 14 Summons on Return: executed, 4/13/83, to Lynn Pierce, Personal service
- 15 Summons on Return: executed, 4/13/83, U.S. Atty, S.F., by mail.
- May 11 17 Defendant U.S.'s Respons to the Second Erspamer Declaration.
- 16 18 Federal Defendant's Notice of Motion to Dismiss: 6/13/83 at 10:30 am.
- 19 —Brief in Support of Motion to Dismiss.
- 20 —Declaration in Response to Plaintiff's First Request to Produce Documents for Inspection and Copying.
- 21 Plaintiffs' First Seto of Interrogatories to All Named Defendants.
- 18 22 Clerk's Notice: Federal Defendant's Motion to Dismiss rescheduled from 6/13/83 to 6/20/83 at 10:30 am.

- 19 23 Plaintiffs' Application for Enlargement of Time for the Hearing of Defendants' Motion to Dismiss.
- 24 —Memorandum of Points and Authorities in Support of #23.
- 25 —Declaration of Michael F. Ram in Support of #23.
RECEIVED: Proposed Order granting #23.
- May 20 26 ORDER re Motion for Expedited Discovery and Order Fixing Place of Deposition: Plaintiffs' may take Depositions of VA Officials Phillips and Standefer in mid to late June in San Francisco. Plaintiffs' request to depose Woodall and Eaton denied without prejudice. MHP
- 24 27 Defendant's Letter to Clerk confirming hearing on Plaintiffs' Motion for Enlargement of Time set for 5/27/83 at 1:30 pm.
- 26 28 Defendants' Opposition to Plaintiffs' Motion to Delay the Defendants Motion to Dismiss.
RECEIVED: Proposed Order denying Plaintiffs' Motion to Delay Defendants Motion to Dismiss.
- 27 29 MINUTES: (c/r Carl Pline) Continuation of Motion to Dismiss granted. Motion rescheduled from 5/20/83 to 8/1/83 at 10:30 am. Status of 7/25/83 vacated. MHP
- Jun 1 30 Plaintiff's Notice of Taking Depositions: Dean K. Phillips, 6/13/83; Richard B. Standefer, 6/15/83.
RECEIVED: Proposed Order re Plaintiffs' Application for Enlargement of Time for the Hearing of Defendants' Motion to Dismiss.

- Jun 7 31 Plaintiffs' Notice of Taking Deposition: Albert R. Maxwell, 6/14/83. Proof of Service attached.
- 8 32 Plaintiffs' Motion for Order of Deposition of Max R. Woodall and Order Fixing Place of Depositions.
- 33 —Memorandum of Points and Authorities in Support of #32.
- 34 —Declaration of Gordon P. Erspamer in Support of #32.
RECEIVED: Proposed Order granting #32.
- 9 35 Plaintiff's Application (ex parte) for Order Shortening Time.
- 36 —Declaration of Gordon P. Erspamer in Support of #35.
- 37 ORDER: #35 granted. Plaintiff's Motion for Order of Deposition of Max R. Woodall and Order Fixing Place of Deposition to be heard at 10:00am on 6/14/83.
- 38 Plaintiff's Notion of Motion for Order of Deposition of Max R. Woodall and Order Fixing Place of Deposition: 6/14/83 at 10:00am.
- 10 39 Plaintiffs' Proof of Service by Mail: Order to Show Cause, to Jack Nagan and Edward J. Lukey, executed 6/10/83.
- 13 40 Defendants' Application for Order Shortening Time: 6/14/83 at 9:30 am.
- 41 —Notice and Motion to Reconsider the Court Ordered Deposition of Dean Phillips.
- 42 —Opposition to Proposed Deposition of Max Woodall.
- 43 ORDER Shortening Time: #41 to be heard 6/14/83 at 11:00 am.
RECEIVED: Proposed Order stating that Depositions of Woodall and Phillips need not be taken.

- 14 44 MINUTES: (c/r Vivian Pella) Plaintiff's Motion for Order of Deposition of Max R. Woodall, granted. Defendant Motion for Reconsideration of Deposition of Dean Phillips—court requests further declarations within a week. Deposition of Phillips stayed. MHP
- 14 45 ORDER: Plaintiffs' Application for Enlargement of Time for Hearing of Defendants' Motion to Dismiss granted: Plaintiffs' opposition due 7/18/83; Defendant's reply due 7/25/83; Hearing 8/1/83 at 10:30am. Status Conference of 7/25/83 is vacated. Parties to agree on dates of depositions to be taken. MHP
- Jun 20 46 Defendants' Answers to Plaintiffs' First Set of Interrogatories.
- 21 47 Federal Defendants' Affidavit of George C. Stoll.
- 48 Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Reconsider Order Fixing Deposition of Dean K. Phillips.
- 49 —Declaration of Michael F. Ram in Support of #48.
RECEIVED: Proposed Order Denying Defendants' Motion to Reconsider Order Fixing Deposition of Dean K. Phillips.
- 50 ORDER: Plaintiffs may take the deposition of Max R. Woodall in San Francisco no later than 6/30/83. MHP
- 27 51 ORDER: Plaintiffs are not entitled to depose Dean K. Phillips in S.F. at the expense to the defendant/s. MHP
- 28 52 Federal Defendants' Amended Affidavit of George C. Stoll.
- Jul 12 53 Defendants' Answers to Plaintiffs' First Set of Interrogatories.

- 54 Plaintiffs' Application for Leave of Court to File Brief in Excess of 25 Pages.
- 55 —Declaration of Michael F. Ram in Support of #55.
- 13 56 ORDER: Plaintiffs may file brief not to exceed 50 pages in opposition to Defendants' Motion to Dismiss. MHP
- 15 57 Federal Defendants' Position re Proposed Oversize Brief and Countermotion to Extend Time.
- 58 —Affidavit of George Christopher Stoll.
RECEIVED: Proposed Order extending defendant's Time to Respond to oversized brief.
- Jul 19 59 Plaintiff's Memo in opposition to defendants' motion to dismiss 8-1-83 10:30 am
- 19 60 Plaintiff's Exhibits to opposition to motion to dismiss
- 19 61 Plaintiff's Declaration of Gordon P. Erspamer in support of opposition to motion to dismiss
- 19 62 Plaintiff's exhibits to declaration of Gordon P. Erspamer re dismiss Exhibit B
- 19 63 Plaintiff's exhibits to declaration of Gordon P. Erspamer re dismiss Exhibit A
- Jul 19 64 Plaintiff's Declaration of Michael F. Ram re opposition to motion to dismiss Exhibit A
- 19 65 Plaintiff's Affidavits & Declarations to opposition to motion to dismiss 8-1-83 10:30 am
- 19 66 Plaintiff's Declarations to opposition to motion to dismiss (Attorneys)
- 19 67 Plaintiff's Affidavits (Attorneys) to opposition to motion to dismiss
- 19 68 Plaintiff's Exhibits to Declaration of Gordon P. Erspamer in opposition to motion to dismiss, exhibit C

- 19 69 Plaintiff's Exhibits to Declaration of Gordon P. Erspamer re opposition to dismissal, Exhibit B
- 19 70 Plaintiff's Exhibits to opposition to motion to dismiss #167...
- 19 71 Plaintiff's Exhibits to opposition to motion to dismiss #20 to 45
- 19 72 Plaintiff's Exhibits to opposition to motion to dismiss #2-14
- 19 73 Plaintiff's Exhibits to opposition to motion to dismiss #46-70
- 19 74 Plaintiff's Exhibits to opposition to motion to dismiss #95-103
- 19 75 Plaintiff's Exhibits to opposition to motion to dismiss #104-126
- 19 76 Plaintiff's Exhibits to opposition to motion to dismiss #150-166
- 19 77 Plaintiff's Exhibits to opposition to motion to dismiss #16-17
- 19 78 Plaintiff's Exhibits to opposition to motion to dismiss #18-19
- 21 79 Defendants supplemental affidavit of G. Christopher Stoll in support of motion to extend time
- 22 80 Plaintiff's Declaration of Kathleen V. Fisher in Opposition to Defendant's Motion to Extend Time.
- 25 81 Defendants' Reply Re Extension of time.
- Aug 2 82 Defendants' Reply Brief.
- Aug 3 83 Defendants' Table of Authorities to Defendants' Brief.
- 84 -Verification of Exhibits.
- 19 85 Defendant, Max R. Woodall's Affidavit.
- 86 -James J. Derhaag's Affidavit.
- 87 -Max R. Woodall's supplemental affidavit.
- 88 James J. Derhaag's supplemental affidavit.
- 22 89 Plaintiff's Declaration of Walter R. Atlee.

- 90 MINUTES: motion to dismiss denied. Case continued to 12-5-83 @ 10:30 a.m. for motion for preliminary injunction.
- 24 91 Plaintiff's Proofs of service Re declaration of Walter R. Atlee returned executed as to Jack Nagan & Edward J. Lukey 8/22/83.
- Sep 26 92 Defendants' notice of objection to request for production and discovery
- 93 Plaintiff's third request to produce documents for inspection and copying.
- 30 94 Plaintiff's request for recording & maintenance of statistical information, notice of intent to request court to draw adverse inference at trial.
- Oct 3 95 Defendants' response to plaintiffs' third request to produce document for inspection & copying.
- 96 -affidavit of Stoll.
- 5 97 Defendants' response to request for recording and maintenance of statistical information.
- 12 98 Plaintiffs' notice of depositions of: C. Coyle, J. Yates, R. Polcari, T. Spindel, Jr., D. Phillips (by Phone). All depositions except the underlined person shall be in person. No issued.
- 99 Defendants' motion to stay discovery. A hearing date not listed.
- 13 100 Defendants' application for order shortening time.
- 101 -declaration of G. Stoll
- 102 ORDER: defendants' motion to stay discovery will be heard on 10-17-83 @ 10:30 a.m. (See order filed herein) Plaintiffs' opposition shall be filed & hand-delivered by 10-14-83 @ 2:00 p.m. Entered 10-14-83 MHP
- 103 ORDER: re discovery (See order) Entered 10-14-83 MHP

- 104 Plaintiffs' declaration of G. Erspamer in opposition to defendants' motion for a stay of discovery.
- 14 105 Plaintiffs' notice of motion for leave of court to file first amended complaint & to compel production of documents.
- 17 106 Defendants' opposition to application for TRO.
- 107 MINUTES: case continued to 10-18-83 @ 9:00 a.m. for motion to amend complaint, and plaintiff motion for TRO. C/R S. Thompson MHP
- 18 108 MINUTES: Plaintiffs motion to amend complaint granted. Plaintiffs motion for TRO denied. Case continued to 12-5-83 @ 10:30 for preliminary injunction. C/R S. Thompson MHP
- 109 Plaintiff's supplemental declaration of M. Blecker in support of a TRO.
- 110 Plaintiff's supplemental declaration of E. Anello in support of a TRO.
- 111 Plaintiff's FIRST AMENDED COMPLAINT
- 19 112 Defendants' response to plaintiffs' third request to produce document for inspection & copying.
- 21 113 MEMORANDUM DECISION & ORDER: Defendant's motion to dismiss is denied (see original order) Entered 10-21-83 MHP
- 24 114 Plaintiff's prior supplemental document request.
- 115 ORDER: Plaintiff's motion for leave to amend complaint granted. Plaintiff's application for TRO is denied without prejudice. Plaintiff motion for preliminary injunction will be heard on 12-5-83. (See original order for particulars) Entered 10-24-83 MHP

- 26 116 Plaintiffs' notice of entry of order granting leave to file first amended complaint, directing production of documents and taking of deposition, and denying temporary restraining order without prejudice and entry of memo decision and order.
- 117 Defendant letter to Courtroom deputy re: reschedule of preliminary injunction hearing.
- Oct 31 118 Plaintiffs' notice of motion & motion to compel production of document and compel answers to deposition question & request for sanctions. set for 10-31-83 @ 10:30 a.m.
- 119 -memo of points & authorities in support of #118.
- 120 -declaration of G. P. Erspamer in support of #118
- 121 -certificate of compliance.
- 122 -ex parte application for order shortening time.
- 123 ORDER: plaintiffs' ex parte application for order shortening time is granted. Plaintiffs' motion to compel production of documents & answers to deposition question and request for sanctions shall be heard at 2:00 p.m. on Tuesday 11-1-83. Entered 10-31-83 MHP
- Nov 1 124 Defendants opposition to motion to compel deposition answers.
- 125 -affidavit of G. C. Stoll.
- 126 -affidavit of G. C. Stoll.
- 127 -affidavit of G. C. Stoll.
- 2 128 MINUTES: plaintiff's motion to compel production of documents & answers to deposition question and request for sanctions (OST) granted. C/R V. Pella MHP

- * 129 Plaintiff/Intervenor's notice of motion to intervene as a plaintiff
- 130 -declaration of R. L. Gnaizda
- 131 -application for and order shortening time for hearing on applicant's motion to intervene.
Received complaint in intervention.
Received order granting leave of court to intervene as plaintiff.
- 132 ORDER: plaintiffs' motion to compel production of documents and answers to deposition question is granted. Defendants shall produce a response to plaintiffs' third request to produce documents for inspection and copying 1,2, & 10 by 11-9-83. Defendants shall pay plaintiffs the sum of \$500.00 for their expenses incurred no later than 12-31-83. Entered 11-8-83 (See original order) MHP
- 133 STIPULATION & ORDER: dismissing fifth claim for relief without prejudice. Entered MHP
- Nov 8 134 Plaintiff/Intervenor's certificate of service.
- 135 Defendants declaration of G. Stoll.
- 136 -application to strike application for order shortening time and to amend the court order.
- 10 137 ORDER: The order shortening time is vacated and counsel for intervenors to fully comply with local rule 220-10(f) in all future request for orders shortening time. Entered 11-15-83. MHP
- 14 138 Defendants' response to third request for production of documents.
- 139 Plaintiffs' notice of application for a preliminary injunction, set for 11-28-83 @ 11:00 a.m.

- 140 -memo of points and authorities in support of #139
- 141 -affidavit and declaration of attorneys and claimants re: #139
- 142 EXCERPT from Vol I of the Deposition of T. Verrill 5-6-83
- 143 DEPOSITION OF T. VERRILL 5-6-83 Vol II.
- * 15 144 DEPOSITION OF A. MAXWELL 6-14-83, with attached exhibits.
- 145 DEPOSITION OF T. JACOBSON, 10-21-83 Vol. I, with attached exhibits.
- * 14 146 DEPOSITION OF R. STANDEFER, 6-15-83, Vol I, with attached exhibits.
- 147 EXCERPT from Vol I, of the Deposition of R. Standefer 6-15-83.
- 15 148 DEPOSITION OF W. HAWKE, 10-24-83, with attached exhibits.
- 149 DEPOSITION OF D. PHILLIPS, 11-1-83, with attached exhibits
- 150 DEPOSITION OF R. POLCARI, 10-19-83.
- 151 DEPOSITION OF T. JACOBSON, 10-24-83, Vol. II
- 152 DEPOSITION OF T. JACOBSON, 10-24-83, Vol. III, with attached exhibits
- * 14 153 DEPOSITION OF M. WOODALL, 6-23-83, Vol i
- 15 154 DEPOSITION OF M. WOODALL, 6-24-83, Vol II, with attached exhibits.
- 155 DEPOSITION OF W. HAWKE 11-3-83, Vol II, with attached exhibits.
- * 14 156 DEPOSITION OF R. Standefer, 6-16-83, Vol II, with attached exhibits. SEE SHEET "E"
- Nov 14 157 DEPOSITION OF T. VERRILL, 5-3-83, Vol I
- 158 DEPOSITION OF T. VERILL, 6-17-83, Vol III, with attached exhibits.

- 159 DEPOSITION OF T. VERRILL, 6-21-83, Vol IV, with attached exhibits.
- 160 DEPOSITION OF T. VERRILL, 7-8-83, Vol V, with attached exhibits.
- 161 DEPOSITION OF T. VERRILL, 7-11-83, Vol VI, with attached exhibits.
- 162 Plaintiff's proof of service.
- 163 Deposition exhibits to T. Verrill 6-3-83 & 6-6-83.
- 164 Deposition exhibits to T. Verrill 6-3-83 & 6-6-83.
- 165 Deposition exhibits to T. Verrill 6-3-83 & 6-6-83.
- 166 DEPOSITION OF S. KETCHUM, M.D., 9-26-83.
- Nov 16 167 Plaintiffs' Declaration, Ralph C. Vaughan, Hearing date, 11/28/83, 11:00 a.m.
Exhibit A & B, attached.
- 168 Declaration, Malcolm C. Souness, Hearing date, 11/28/83, 11:00 a.m.
- 169 Defendants' Affidavit, Harry N. Walters, Asserting Deliberative Process Privilege.
- 170 ORDER-Granting Leave of Court to American G. I. Forum, to Intervene as Plaintiff. MHP
- 171 COMPLAINT IN INTERVENTION: No Process., by, American G. I. Forum.
- Nov 14 172 Letter, dated 11/10/83, to George Christopher Stoll, from C. Kerosky.
- Nov 16 173 Defendants' Opposition to Motion to Intervene.
- Nov 17 174 MINUTE ORDER—(11/16/83) (C/R: Susan Thomson, 524-4576) re: Applicant, American G. I. Forum Motion to Intervene (OST)—Granted; provided currently set dates remain unchanged. Complaint-In-Intervention deemed filed as of today. MHP

- Nov 18 175 ORDER FOR PRETRIAL PREPARATION: Trial date—6/5/84 at 9:30 am. Pretrial Conference—4/9/84 at 10:30 am. Pretrial statements due 3/26/84. MHP
- 21 176 Defendants' Closing Brief.
- 23 177 Defendants' Notice of in Camera Production of Documents.
- 178 Plaintiffs' Memorandum of Points and Authorities in Reply to Defendants' Opposition to Application for a Preliminary Injunction.
- 30 179 Plaintiffs' Declaration of Michael A. Blecker in Support of Application for Preliminary Injunction: 12/1/83 at 2:30 pm.
- 180 -Supplemental Declaration of Michael F. Ram in Support of Application for a Preliminary Injunction.
- 181 ORDER: Letters reviewed *in camera* shall not be produced. Defendants shall not use letters as evidence in support of their opposition to the motion for preliminary injunction or they shall be produced for plaintiffs. MHP
- Dec 2 182 Defendant's Letter to Mylio S. Kraja, Executive Director of the American Legion requesting aid in defense against this claim.
- * 1 183 MINUTES: (C/R Vivian Pella) Plaintiff's Motion for Preliminary injunction, submitted MHP
- 19 184 Federal Defendant's Supplemental Authorities.
- 27 RECEIVED: Stipulation and Proposed Order allowing defendants an additional 10 days in which to pay sanctions.

1984
 Jan 4 185 STIPULATION AND ORDER: Defendants have thru 1/10/84 to pay or apply to court for relief from order of 11/8/83 awarding sanctions. RFP

13 186 Defendant's ANSWER TO FIRST AMENDED COMPLAINT.

Jun 12 187 OPINION: Motion for preliminary injunctive relief is GRANTED (see Opinion) MHP

13 188 Plaintiff's Notice of Entry of opinion

20 189 Defendant's *Notice of Appeal* to the Supreme Court; No fee paid Pkg. given

Jun 25 190 Plaintiffs' Memo in Opposition to Defendants' Motion for Stay of Preliminary Injunction

191 Defendants' Application for Order Shortening Time

192 -Declaration in Support of Application for Order Shortening Time

193 ORDER: Application for Defendants' order to Shorten time for motion for a Stay pending Appeal is GRANTED; Opposition papers due 6-26-84 MHP

194 Defendant's Notice of Motion for Stay Pending Appeal (un-noticed)

195 —Brief in Support of Motion for Stay Pending Appeal RECEIVED: Order

26 RECEIVED: Proposed Order Re: Summary Judgment

RECEIVED: Proposed Order Re: Preliminary Injunction

27 196 MINUTES: (c/r V. Pella) Defendants' Motion for Stay Pending Appeal Order Shortening Time GRANTED IN PART & DENIED IN PART MHP

** 22 197 Plaintiffs' 1st set of Interrogatories to all named Defendants and 5th request for production of Documents

Jul 20 198 ORDER: Defendants shall post attached notice in every Veterans Administration Office where SSDC Claims [sic] are adjudicated or appeals decided, Notice will be printed on 8-1/2 x 11 inch paper MHP

199 ORDER: Re: Modification that defendants' motion for a Stay is GRANTED IN PART AND DENIED IN PART (see order) MHP

23 200 Defendant's responses to Plaintiff's 2nd set of Interrogatories

Aug 20 201 -NOTICE OF APPEAL; Fee not required, Pkg. Given

24 -mailed copy of Appeal to US Supreme Court

Sept 17 202 Plaintiff's 4th set of Interrogatories and 6th request for production

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF
(CAPTION OMITTED)

No. _____

Plaintiffs complain of defendants and each of them, and allege the following:

I

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief challenging the constitutionality of 38 U.S.C. §§ 3404 and 3405. This Court is vested with jurisdiction pursuant to 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1331. This action arises under the Constitution of the United States and plaintiffs herein allege violations of the Fifth Amendment of the United States Constitution. Venue is proper under 28 U.S.C. § 1402(a) and 28 U.S.C. § 1391(e).

II

THE PARTIES

2. Plaintiff NATIONAL ASSOCIATION OF RADIATION SURVIVORS ("NARS") is a voluntary, non-profit corporation organized and existing under the laws of the State of California, whose central office is located in San Francisco, California. Its membership is comprised mainly of veterans and the families of veterans who participated in atomic bomb tests conducted by THE UNITED STATES OF AMERICA, and includes recipients of defendant THE VETERANS ADMINISTRATION ("V.A.") Death and Disability Compensation, as defined below, as well as potential claimants for the same. The purpose of NARS is to obtain health care, compensation and other benefits and necessities to which radiation survivors are entitled. Numerous NARS members have Death and Disability Compensation claims, as defined below, under 38 U.S.C. §§ 301 *et. seq.*, 401 *et. seq.* pending before the V.A. or the Veterans Administration Board of Veterans Appeals ("BVA"). Several other NARS members are existing recipients of V.A. Disability Compensation, as defined below, whose disability

ratings have been reduced or are being threatened with reduction by the V.A.

3. Plaintiff SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION (hereafter "SWORDS TO PLOWSHARES") is a non-profit corporation organized in 1974 and dedicated to serving the interests of United States veterans, and particularly Vietnam veterans, and to facilitating their continuing transition to civilian life. SWORDS TO PLOWSHARES conducts outreach programs to assist veterans in enhancing their job skills, seeking employment opportunities, and obtaining medical care. SWORDS TO PLOWSHARES also provides clearinghouse and referral services for veterans in conjunction with governmental, social service, and veterans' assistance agencies, and halfway houses. Several staff members of SWORDS TO PLOWSHARES are existing recipients of or applicants for V.A. disability benefits, and numerous veterans served by SWORDS TO PLOWSHARES have Death and Disability Compensation claims pending before the V.A. or are existing recipients of Death and Disability Compensation, as defined below. SWORDS TO PLOWSHARES was recognized by the V.A. as an accredited service organization under the below-described 38 C.F.R. § 14.628 *et. seq.*, but only after it commenced a civil action to compel its recognition.

4. NARS and SWORDS TO PLOWSHARES bring this action as the representatives of their members and/or constituencies. The nature of the claims alleged herein and of the relief sought does not make the individual participation of each injured member and/or constituent indispensable to proper resolution of the lawsuit. Hereinafter, NARS and SWORDS TO PLOWSHARES will occasionally be referred to collectively as "the Organizational Plaintiffs."

5. DON E. CORDRAY ("CORDRAY"), who resides in Concord, California, is a United States Navy veteran who received the World War II Victory Medal and served aboard the USS Fulton (AS-11) during Operation Crossroads, an atomic bomb testing operation conducted by the UNITED STATES in 1946. He also served in the Korean War and the Vietnam War. After enlisting in the Navy on

March 2, 1945, CORDRAY was assigned to the USS Fulton for duty at the Bikini Atoll during atomic test blasts "Able" and "Baker" of Operation Crossroads in 1946, and was exposed to dangerous amounts of atomic radiation. During atomic blast Able, CORDRAY and eighteen others were positioned on the deck of the USS Fulton as "guinea pigs." CORDRAY was ordered to move in immediately after blast Able to recover scientific test materials from the target ships, and did so. After blast Baker, the USS Fulton, with CORDRAY aboard, towed the S.S. Skate, a target vessel of test Baker, to Pearl Harbor. When the Fulton reached Mare Island in October of 1946 the forward part of the ship was still so "hot" from radiation that it could not be decommissioned.

6. As a result of his exposure to radiation, CORDRAY contracted and now suffers from a very rare form of cancer, oat cell carcinoma. Also as a result of his exposure to radiation, CORDRAY suffers from muscle weakness, severe pain in his lower back, muscle aches and stiffness, and severe headaches.

7. While very ill and receiving regular doses of morphine to kill pain, and without the assistance of legal counsel, he filed V.A. service-connected Disability Compensation claims, as defined below, for these ailments in 1977, 1979 and 1982, all of which were denied by the V.A. on grounds of lack of proof; the most recent denial occurred on January 5, 1983 by the V.A. San Francisco, California Regional Office, Claim No. C 24 942 530. CORDRAY was represented before the V.A. by the Veterans of Foreign Wars. CORDRAY desired to have an attorney represent him before the V.A., but was prevented from retaining an attorney by 38 U.S.C. §§ 3404 and 3405. A true copy of CORDRAY's Accredited Representative's May 31, 1978 Statement concerning CORDRAY's then pending appeal is attached hereto as Exhibit "A", and incorporated by this reference. CORDRAY currently has a 10% V.A. disability rating arising out of an unrelated condition.

8. ALBERT R. MAXWELL ("MAXWELL") is a veteran of the United States Army who served in the Asiatic theater during World War II after being inducted in De-

cember 1940. MAXWELL's unit was shipped to Fort Stotsenberg in the Philippines in approximately May 1941, where he served as a tank commander. MAXWELL is a survivor of the battles of the Bataan Peninsula between December 1941 until the fall of Bataan in April 1942. MAXWELL was among the approximately 5,000 survivors of the 22,000 soldiers who were subjected to the Bataan Death March in April 1942. Thereafter, MAXWELL was pressed into forced labor in Cabana Natuan and as a stevedore near Manila, and for a time was confined to Billibid prison in the Philippines. Later MAXWELL was herded along with 1500 other prisoners of war ("POW") into the hold of a "hell ship" destined for Japan. Casualties were legion because of overcrowding, lack of food and water, and the absence of sanitary facilities. Before the hell ship could reach Japan, it was torpedoed and sunk and MAXWELL was among the 52 survivors picked up by a Japanese merchantman. After being turned over to the Japanese again in Formosa, MAXWELL in late 1943 was transported to Mukden, China where he and other POW's were forced into hard labor in a copper mine. From there, he was later conveyed to Nagoya, Japan where he worked as a laborer in a steel foundry. MAXWELL, who is six feet three inches tall and who in the later stages of this last internment weighed 90 pounds, was compelled by his captors to be a member of two clean-up details after atomic bombs were dropped on Hiroshima and Nagasaki on August 6 and August 9, 1945, respectively. His POW camp was also subjected to radioactive fallout from the atomic blasts. On September 9, 1945 MAXWELL's POW camp was finally liberated and in October 1945 MAXWELL returned to the United States aboard the hospital ship "Hope".

9. MAXWELL and his wife Jackie have had five children—Paulette, born July 14, 1948, Michael, born June 13, 1950, Michele, born July 4, 1951, Robyn, born January 9, 1957 and Rebecca, born August 22, 1961. Two of MAXWELL's five children, Paulette and Michael, died in early childhood due to tetralogy of fallot, an extremely rare heart abnormality peculiarly associated with exposure to atomic radiation. Two other children, Michele and Rebecca, died in

early childhood from atelectasis of the lungs, another rare congenital abnormality strongly associated with exposure to atomic radiation. One child alone, Robyn, has survived to adulthood.

10. In December 1947 MAXWELL was given a medical discharge from the Army and awarded a 50% Disability Compensation rating, as defined below, for "residuals of beriberi, malaria, shrapnel injury to right ankle, optic atrophy, conjunctivitis and diminishing eyesight of the left eye." On March 30, 1959, the V.A. Rating Board reduced MAXWELL'S disability rating from fifty percent (50%) to forty percent (40%) due to alleged improvement in his leg scars and vision, Claim No. C9594221. MAXWELL was represented before the Rating Board by the Disabled American Veterans ("DAV").

11. As a result of his above-described exposure to atomic radiation, MAXWELL developed multiple myelomas in approximately 1980. MAXWELL is terminally ill and currently undergoing chemotherapy to treat his cancer. In addition, due to radiation exposure and the severe malnutrition suffered and mistreatment received during his captivity, MAXWELL has suffered from a variety of other diseases and conditions, including malaria, nervous disorders, beriberi, eye diseases, headaches, fatigue, weight loss, insomnia, allergies, degenerative disc disease, chest pains, and calcium spasms, which have from time to time necessitated further hospitalization. MAXWELL has been unable to work since 1979 due to his medical problems, and has exhausted his savings.

12. On December 11, 1981, MAXWELL filed a V.A. claim to contest his service-connected disability rating of forty percent (40%) and seek a total disability rating, and was represented by the DAV. MAXWELL had approached an Ogden, Utah attorney with regard to his possible representation of MAXWELL before the V.A., but the attorney declined to represent him because of the below-described \$10.00 fee limitation. No investigation or development of facts was undertaken by the DAV. A true copy of MAXWELL'S original claim is attached hereto as Exhibit "B" and incorporated by this reference. Due to unauthorized ac-

tion by MAXWELL'S DAV representative, MAXWELL'S personal hearing (set for March 17, 1982) was cancelled rather than merely postponed, a fact MAXWELL did not discover until December 1982 when he wrote a letter to the DAV, a true copy of which is attached as Exhibit "C" and incorporated by this reference.

13. On December 2, 1982 MAXWELL filed a further Statement in Support of Claim, a true copy of which is attached as Exhibit "D" and incorporated by this reference. On January 4, 1983, MAXWELL filed a supplemental Statement in Support of Claim, a true copy of which is attached as Exhibit "E" and incorporated by this reference. Thereafter, on approximately February 9, 1982, MAXWELL'S claim for service-connected disability for multiple myelomas, a degenerative joint disease, and a peptic ulcer, was denied by the V.A. Salt Lake City, Utah Regional Office, Claim No. C 09 594221.

14. REASON F. WAREHIME ("WAREHIME") is a thrice-wounded veteran who served in the United States Marine Corp in the Asiatic Theater during World War II and in the United States Army during the Korean conflict from 1950-52. WAREHIME was a member of the United States Marine Corp clean-up detail in Nagasaki, Japan in August 1945 after the atomic bomb blast there. In April 1953, WAREHIME, then stationed at Fort Knox, Kentucky, was ordered to participate in Operation Simon, Upshot Knoch, a 43 Kiloton tower plutonium bomb test shot in Camp Desert Rock, Nevada. WAREHIME was the non-commissioned officer in charge of the advance party of troops assigned to trenches 3000 yards from ground zero of the blast, and, pursuant to orders from his superiors, advanced along with his fellow troops toward ground zero after the atomic bomb was detonated. THE UNITED STATES purpose in ordering ground troops into the blast area was to obtain data concerning the behavior of ground troops in nuclear warfare.

15. WAREHIME was honorably discharged from the service in May 1958 and has received V.A. Disability Compensation as defined below, since 1959. The United States lost WAREHIME'S service records in approximately 1975

or 1976. Since 1976, WAREHIME has suffered from osteoprosis of the bone, muscle atrophy, sterility, cataracts, and lung cancer as a result of his exposure to radiation in Nagasaki and during Operation Simon. WAREHIME'S left lung was surgically removed in May 1982. WAREHIME is dependent upon crutches and a wheelchair for locomotion, and his left arm is inoperable without a brace. He is blind in the right eye as the result of a series of service-connected injuries.

16. Notwithstanding that several V.A. doctors, including Harry Bouman, M.D., have determined that WAREHIME is unemployable, WAREHIME currently possesses a service-connected disability rating of only 60%, although his disability rating was formerly 100%. He is totally dependent upon V.A. Disability Compensation, as defined below, for his support and that of his wife. WAREHIME's challenge to his 60% disability rating was recently remanded by the BVA to the San Francisco Regional Office for the third time since 1976 for further development of evidence, Claim No. C 13 005 384. WAREHIME personally completed the paperwork concerning his V.A. claim after several attorneys refused to handle his claim because of the below-described \$10.00 fee limitation. WAREHIME is a member of DAV and is represented before the BVA by an unknown DAV service officer in Washington, D.C. and was represented by the DAV when his claim was denied by the San Francisco regional V.A. office. The DAV's service officer's role at the regional office level was merely to appear at the hearing with WAREHIME and offer his service and medical records.

17. As reflected in a letter from the V.A. to WAREHIME dated January 22, 1982, and a letter from the V.A. to Robert T. Durbrow, Esq., dated April 2, 1981, true copies of which have been attached hereto as Exhibits "F" and "G," respectively, the V.A. has actively sought to discourage and prevent WAREHIME from obtaining legal representation before the V.A. Exhibit "D," for example, expressly states to WAREHIME's attorney that "your attention is invited to [sic] particular to [38 C.F.R.] section 14.634," the V.A. regulation concerning the below-

described \$10.00 fee limitation for handling V.A. claims. Furthermore, as reflected in an undated letter from the V.A., a true copy of which is attached hereto as Exhibit "H" and incorporated by this reference, the V.A. has sought to actively discourage WAREHIME from exercising his right to a personal hearing.

18. DORIS J. WILSON ("WILSON") is the widow of Stanley Wilson, who died on December 12, 1980 from pancreatic cancer. WILSON's husband, Stanley Wilson, served in the United States Navy, mainly in the Pacific Theatre, from June 22, 1943 to June 9, 1947. Several of the Navy ships to which Stanley was assigned after World War II were involved in atomic testing. On one of Stanley Wilson's ships that was contaminated with radiation, several men lost their hair and others became nauseated. The officers and crew were troubled by their inability to decontaminate the ship.

19. In 1979, after Stanley Wilson was diagnosed as having cancer, WILSON contacted a Sacramento, California, attorney to discuss a possible claim for V.A. Disability Compensation. The attorney told her that he could not represent Stanley Wilson before the V.A. because of the \$10.00 attorney's fee statute. He further stated that because of the \$10.00 limitation he doubted that WILSON could find *any lawyer* who would take a V.A. Disability Compensation case. Because of this conversation, WILSON gave up trying to find a lawyer to prosecute Stanley Wilson's Disability Compensation claim.

20. As a result of his servicetime exposure to radiation, Stanley Wilson died of cancer on December 12, 1980. On December 17, 1981, WILSON filed a Death Compensation claim, as defined below, with the San Francisco Regional V.A. Office. On January 14, 1982, WILSON'S claim was disallowed by the San Francisco office as not service connected. On January 28, 1982, WILSON submitted a Notice of Disagreement on a "Statement in Support of Claim" form, a true copy of which has been attached as Exhibit "I" and incorporated by this reference. In March 1982, she filed a Request for Extension to File Appeal so that she could collect more evidence, not knowing that she had up until a

year from the original decision to file her appeal. WILSON'S service representative, the Veterans of Foreign Wars, did not aid WILSON in searching for records of her husband's exposure to radiation and she found it to be a very difficult and time-consuming process. She still has not been able to obtain many of Stanley Wilson's basic service records or obtain documentation of the particulars of her late husband's service-connected radiation exposure.

21. On May 5, 1982 WILSON received a letter from the V.A. acknowledging her request for a hearing and attempting to persuade her to waive her right to a hearing. A true copy of said letter is attached hereto as Exhibit "J" and incorporated by this reference. On June 23, 1982, WILSON received a letter from the San Francisco Office of the V.A. stating that she must submit any additional evidence to the San Francisco Office by January 22, 1983. WILSON wrote a letter to the San Francisco V.A. Office on January 12, 1983, asking for more time to collect evidence. On January 18, 1983, two days before her time to file additional evidence with the San Francisco Office expired, her Veterans of Foreign Wars service officer advised WILSON to simply allow the time to file additional evidence to expire, suggesting that, if WILSON lost, she could refile with additional evidence. WILSON still desired an extension to allow her to collect additional evidence of her husband's exposure to radiation. However, on February 15, 1983, WILSON'S appeal was denied by the BVA, Claim No. 14 992 808. Hereafter, CORDRAY, MAXWELL, WAREHIME, and WILSON will be occasionally referred to collectively as "the Individual Plaintiffs."

22. The V.A. is an administrative agency of defendant THE UNITED STATES OF AMERICA ("THE UNITED STATES") charged with the responsibility of administering, *inter alia*, Title 38 of the United States Code, which codifies various statutes affecting veterans of the various branches of the armed forces of THE UNITED STATES.

23. Defendant HARRY N. WALTERS is Administrator of the V.A. and is named herein solely in his official capacity. Defendant PAUL D. ISING is Director of the San

Francisco Regional Office of the V.A. and is named herein solely in his official capacity.

III THE VETERANS ADMINISTRATION STATUTES AND REGULATIONS

24. The V.A. is the third largest federal agency, employs approximately 200,000 people, and has a budget of approximately \$22 billion per year. The V.A. operates about 172 medical centers which collectively represent the largest health care delivery system in the world. There are approximately 30 million living veterans and approximately 90 million people are potentially eligible for various veterans' benefits, which include income maintenance, pensions, health care, education, housing, burial benefits and service-connected death and disability compensation. The Administrator of the V.A. has discretion whether to award certain veterans' benefits such as funeral expenses (38 U.S.C. § 902), but not service-connected Death and Disability Compensation as defined below. Approximately 10 million V.A. Benefit claims are filed yearly.

25. The purpose of 38 U.S.C. § 301 *et seq.* is to provide compensation to veterans and the families of veterans who have suffered diseases or disabilities or died in the line of duty. 38 U.S.C. § 310, entitled "Basic Entitlement," provides for disability compensation as follows:

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable ... compensation as provided in this subchapter....

Similar provisions are contained in 38 U.S.C. § 321 ("Basic Entitlement" to wartime death compensation), 38 U.S.C. § 331 ("Basic Entitlement" to peacetime disability compensation) and 38 U.S.C. § 341 ("Basic Entitlement" to peacetime death compensation). The rates of wartime and peacetime disability compensation correspond to the percentage

degree of disability found and are specified in 38 U.S.C. §§ 314-315, 334. The rates of wartime and peacetime death compensation are specified in 38 U.S.C. §§ 322, 342.

26. Similarly, 38 U.S.C. § 401 *et. seq.* was intended to provide dependency and indemnity compensation to spouses, children and/or parents of veterans whose deaths were service-connected. 38 U.S.C. § 410(a) provides in relevant part as follows:

When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Administrator shall pay dependency and indemnity compensation to such veteran's surviving spouse, children and parents . . .

38 U.S.C. § 411 specifies the rates of dependency and indemnity compensation for a surviving spouse, while 38 U.S.C. §§ 413-414 and 415 specify the rates for surviving children and parents, respectively. When a Death and Disability Compensation claim is allowed, the claimant may be entitled to accrued benefits pursuant to 38 U.S.C. § 3021 and 38 C.F.R. § 3.1000 *et. seq.* ("basic entitlement" to accrued benefits). These statutory entitlements contained in 38 U.S.C. § 301 *et seq.* and § 401 *et. seq.* create property interests protected by the Due Process Clause of the Fifth Amendment. Hereinafter, the above statutory entitlements will be collectively referred to as "Death and Disability Compensation."

27. Qualified claimants for and recipients of Death and Disability Compensation possess a statutory entitlement to such compensation. Death and Disability Compensation is not gratuitous, but is earned by successful completion of the serviceman's enlistment contract and satisfaction of other eligibility requirements. For example, veterans are not eligible for Death and Disability Compensation if they received bad-conduct discharges arising out of a general court martial or, if their injuries were due to their own willful misconduct. (38 U.S.C. § 101(2), 38 C.F.R. §§ 3.12-3.15). By entering the military and becoming potentially eligible for such compensation, a serviceperson, and his or her spouse and offspring, are deprived of their property right to bring an action against THE UNITED

STATES under the Federal Tort Claims Act in any way arising out of the serviceperson's period of national service.

28. 38 U.S.C. §§ 3404-3405, the original predecessor of which was enacted in 1862, govern the circumstances under which agents and attorneys may represent veterans and other claimants for the purpose of preparing, presenting and prosecuting Death and Disability Compensation claims and claims for other veterans benefits (hereinafter collectively referred to as "Benefit Claims"), and Benefit Claim administrative appeals. 38 U.S.C. § 3404(c) provides that an agent's or attorney's fee for an allowed Benefit Claim shall be determined by the Administrator of the V.A. and "shall not exceed \$10 with respect to any one claim." 38 U.S.C. § 3505 provides that:

Whoever (1) directly or indirectly solicits, contracts for, charges or receives, or attempts to solicit, contract for, charge or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than \$500 or imprisoned at hard labor for not more than two years, or both.

The \$10.00 fee limitation is prominently described in various V.A. forms and correspondence sent to claimants, potential claimants, and recipients.

29. The V.A. has promulgated regulations under 38 U.S.C. § 3404 governing representation of claimants for and recipients of Death and Disability Compensation and other veterans' benefits (hereinafter collectively referred to as "Benefit Claimants") in 38 C.F.R. §§ 14.626-14.637, 19.128-19.132. 38 C.F.R. § 14.634(a) provides in pertinent part that

For the successful prosecution of claims, attorneys and agents may receive the fee permitted by statute [\$10]. The fee will be paid to the attorney or agent of record at the time of allowance, by deduction from the benefit allowed, after approval by the Veterans Administration . . .

The regulations make no provision for fees in unsuccessful Benefit Claims or Benefit Claim appeals. Each and every

award of attorneys' fees rests in the sole discretion of the Administrator of the V.A. Plaintiffs are informed and believe, and thereon allege, that extremely few V.A. Benefit Claims result in actual awards of attorneys' fees.

30. V.A. Benefit Claimants possess only a qualified right to representation by counsel of their choice. 38 C.F.R. § 14.629 sets forth the requirements for V.A. recognition of a Benefit Claimant's representative, agent, or attorney and vests the V.A. District Counsel with the authority to resolve any question of their qualifications.

31. As an alternative to self-representation or representation by an attorney or agent, 38 C.F.R. § 14.628 allows a Benefit Claimant to be represented by lay representatives of certain qualified service organizations, such as DAV, the American Legion ("AL"), and Veterans of Foreign Wars ("VFW"). V.A. regulations prohibit simultaneous representation of a Benefit Claimant by both an attorney (or agency) and a service organization. (38 C.F.R. § 14.631(c)).

32. The V.A. has also promulgated regulations granting limited procedural rights to Benefit Claimants. These include the right to a hearing and to present witnesses (38 C.F.R. § 3.103(c)), the right to submit documentary and other evidence (38 C.F.R. § 3.103(b)), and the right to appeal an adverse V.A. decision to the BVA (38 C.F.R. § 3.103(e)). Benefit Claimants have no right to compel the attendance of or to cross-examine government or third-party witnesses or to subpoena documents to obtain material in support of Benefit Claims. There are no provisions for depositions, interrogatories or other formal discovery.

33. Initial applications for Benefit Claims are made to a V.A. regional office, of which there are 57 and at least one in each state. The initial decision respecting a Benefit Claim is made by a rating agency and is called a rating. (38 C.F.R. §§ 3.321-3.323, 3.340-3.341, 3.343-3.344, 3.350-3.384). A schedule for rating disabilities is found in 38 C.F.R. §§ 4.1-4.150. Decisions of the rating agency "as to conclusions based on evidence on file at that time" are "final and binding upon all field offices of the Veterans Administration" (38 C.F.R. § 3.104(a)). Reductions and discontinuances of ratings respecting previously granted Benefit

Claims are governed by the criteria set forth in 38 C.F.R. § 3.500 *et. seq.*

34. When the V.A. acts upon a Benefit Claim, it sends the claimant an initial determination called a "Notice of Decision" pursuant to the authority contained in 38 C.F.R. § 3.100. In cases of denial, the Notice of Decision, a true example of which is attached as Exhibit "K" and is incorporated by this reference, perfunctorily expresses the denial without presenting findings of fact or any other indication of the basis for the denial. Plaintiffs are informed and believe, and thereon allege, that approximately 50% of Death and Disability Compensation Claims are denied in the original instance. The Benefit Claimant is allowed sixty days to submit additional evidence and/or request a hearing. If requested, a hearing is held in a regional office before a three-member board. Plaintiffs are informed and believe, and thereon allege, that the vast majority of V.A. claims initially denied by regional offices are withdrawn or abandoned before exhaustion of the appeal process.

35. To challenge an adverse, final decision by the regional office, the Benefit Claimant must file a "Notice of Disagreement" within one year from the mailing of the original denial expressed in the Notice of Decision. (38 U.S.C. § 4005, 38 C.F.R. §§ 19.113, 19.118(a)). Approximately 70,000 Notices of Disagreement are filed yearly. Upon receipt of the Notice of Disagreement the V.A. may either change its decision and allow the relief requested or proceed, usually within ninety days, to prepare a "Statement of the Case" summarizing the factual record and applicable law, and stating the decision of the V.A. and reason therefore, which constitutes the final decision of the regional office. (38 C.F.R. § 19.115). The Benefit Claimant can challenge the final decision of the regional office by filing a "Substantive Appeal" within 60 days from the date of mailing of the Statement of the Case (38 C.F.R. § 19.118(b)), that must "set out specific allegations of error of fact or law." (38 C.F.R. § 19.116). The Benefit Claimant is presumed to agree with every statement of fact contained in the Statement of the Case to which no exception is taken in the Substantive Appeal. (38 C.F.R. § 19.145(a)).

36. Approximately 40,000 Substantive Appeals are filed yearly, but the vast majority of Benefit Claims do not ever reach the appeal stage. Upon filing of the Substantive Appeal, the claim is transferred to the BVA in Washington, D.C. for decision. The BVA consists of fifteen three-member panels the members of which are appointed by the V.A. Administrator with the approval of the President. Normally, two panel members are lawyers and one is a doctor. A Benefit Claimant can request a BVA hearing before a panel on appeal in which argument and testimony may be presented. (38 C.F.R. § 19.133). However, the panel hearing the appeal is not necessarily the panel that will decide the appeal. No cross-examination is permitted (38 C.F.R. § 13.133(c)), and the BVA "will not require the appearance of any Veteran Administration official or other person." (38 C.F.R. § 19.135(a)). Approximately 1500 BVA hearings are held yearly, and most BVA appeals are resolved without a hearing. The BVA disposes of each issue upon appeal by allowance, denial, remand or dismissal, in whole or in part. (38 C.F.R. § 19.145(b)). The BVA is bound in its decisions by V.A. regulations, instructions by the Administrator of the V.A., and precedent opinions of the V.A. general counsel. (38 U.S.C. § 4004(c)).

37. In approximately ninety-eight percent (98%) of BVA appeals, the Benefit Claimant is not represented by an attorney. The vast majority of BVA hearings last less than one hour, documentary exhibits are seldom offered, and instances in which anyone other than the claimant testifies are infrequent. Approximately 35,000 adverse regional office determinations per year are resolved by the BVA, which typically allows the claims in only approximately thirteen percent (13%) of said appeals. A high percentage of BVA decisions (approximately 16%) involve remands for development of further evidence, and it is quite common for a claim to be remanded multiple times.

38. Decisions of the BVA are final, and judicial review of decisions is expressly prohibited. (38 C.F.R. § 19.104, 38 U.S.C. § 211(a)). Reconsideration of an appellate decision otherwise final may be granted by the BVA based upon al-

legation of error of fact or law (38 C.F.R. § 19.148(a)), but reconsideration is seldom granted in actual practice.

39. Many V.A. internal rules, policies, guidelines and decisions are not publicly circulated. The "law" applicable to the V.A. Benefit Claims process includes not only Title 38 of the United States Code and Volume 38 of the Code of Federal Regulations, but numerous rules and policy guidelines in internal V.A. documents called "Manuals," "Circulars," "Interim Issues," and "Program Guides."

IV

VETERANS ADMINISTRATION DEATH AND DISABILITY CLAIMS

40. Most V.A. Death and Disability Compensation claims raise complex factual and legal questions respecting proof of service-connected exposure or injury, and medical and other proof respecting causation and degree of disability. Illustrative of extant, complex categories of Death and Disability Compensation claims before the V.A. are those based upon exposure to nuclear radiation during government atomic bomb tests ("Atomic Veteran Claims"), exposure to toxic chemicals such as Agent Orange ("Agent Orange Claims"), drug testing (e.g., LSD), and psychological stress syndrome caused by wartime service ("Stress Syndrome Claims"). These claims, which have only begin to surface in the last decade, present novel issues and often require expert testimony. In these cases, and in all others as well, claimants must obtain documents, studies, reports and other supporting material from a variety of sources to support claims and satisfy the claimant's burden of proof. In many instances, claimants' service records have been lost or destroyed. In addition, the statutes, rules and regulations pertaining to V.A. Benefit Claims are voluminous, complicated, technical and often not publicly circulated. The regulations alone comprise two entire volumes in the Code of Federal Regulations (totaling over 700 pages).

41. The burden of proof and burden of going forward with the evidence respecting V.A. Benefit Claims is on the claimant. 38 C.F.R. § 3.102 provides in relevant part that "the claimant is required to submit evidence sufficient to

justify a belief in a fair and impartial mind that his claim is well grounded. . . ." Plaintiffs are informed and believe, and thereon allege, that a high percentage of V.A. Death and Disability Compensation claims are unsuccessful, and most unsuccessful claims are denied on the basis of an alleged failure of proof. For example, plaintiffs are informed and believe, and thereon allege, that none of the more than 6,000 Agent Orange Claims has been allowed, and less than one percent (1%) of the approximately 2000 Atomic Veterans Claims to date has been allowed.

42. 38 C.F.R. § 3.103 provides in pertinent part as follows:

(a) *Statement of policy*. . . . It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government.

In actual practice, the V.A. does not assist claimants in developing facts supporting Death and Disability Compensation claims or even attempt a search for information, witnesses or documents that might support such claims.

43. Further, the policy of the V.A. is to treat the record for each Death and Disability Compensation claim as discrete, regardless of whether evidence of record in other, similar claims lends support to the claim being adjudicated. 38 C.F.R. § 3.101 states in relevant part that:

Conclusions reached in individual cases are frequently influenced by peculiar facts or local statutes and, consequently, will not be followed as precedents. However, where it is apparent beyond question that the situation is identical, such conclusions may be followed as a matter of consistency in the adjudication of claims under the law or regulations applicable.

Similarly, in instances in which the V.A.'s rules or procedures are the subject of a successful court challenge, the V.A.'s policy is to modify or correct its rules or procedures only in the geographical area bounded by the jurisdiction of the particular Court making the determination, and not elsewhere.

44. While an extremely small proportion of Death and Disability Compensation claimants or recipients is able to secure the assistance of attorneys on a *pro bono* basis, the vast majority of such claimants and recipients (approximately ninety-eight percent (98%)), is relegated to self-representation or representation by a service organization. Insufficient *pro bono publico* legal services exist to serve the needs of Death and Disability Compensation claimants, potential claimants, and recipients who desire attorneys to represent them. Even if a claimant does obtain *pro bono* representation, the uncompensated attorney is unable to devote the time, attention and resources to the claim that he or she might if compensated, all to the detriment of the represented claimant.

45. Most members of the service organizations certified by the V.A. to represent Death and Disability Compensation claimants and recipients are not trained or licensed attorneys. The few service organizations who have staff attorneys have insufficient resources to handle anything but an occasional Death and Disability Compensation claim. Neither Death and Disability Compensation claimants and recipients nor the vast majority of the service organization employees recognized as representatives under 38 C.F.R. §§ 14.626 through 14.637 (such as the American Legion and VFW) have the necessary training, personnel, resources, or experience to prepare, present or prosecute Veterans Administration Death and Disability Compensation claims, especially categories of complex claims such as Atomic Veterans Claims, Agent Orange Claims and Stress Syndrome Claims.

46. As a result of 38 U.S.C. § 3404 and the regulations promulgated thereunder, and 38 U.S.C. § 3405, which makes violation of 38 U.S.C. § 3404 a criminal offense, the Individual Plaintiffs and many members of the Organizational Plaintiffs, as well as the vast majority of V.A. Death and Disability Compensation claimants, potential claimants, and recipients, have been unable to obtain lawyers to represent them and pursue their claims. Still others have been discouraged by the fee limitation from even seeking the assistance of counsel. But for the statutory prohibition,

many, if not all, of the claimants who desire attorneys would have obtained competent legal representation. Further, because of the limitations of 38 U.S.C. §§ 3404-3405, SWORDS TO PLOWSHARES staff members lack the resources to properly investigate, prepare and present Death and Disability Compensation claims of its constituents, all to their substantial prejudice.

47. As a further result of 38 U.S.C. §§ 3404-3405, those few Death and Disability Compensation claimants or recipients who are represented by attorneys receive, on the whole, less vigorous representation than they would receive if allowed to compensate their attorneys for the reasonable value of the attorneys' services.

48. Plaintiffs are informed and believe, and thereon allege, that but for the limitations imposed by 38 U.S.C. §§ 3404-3405, Death and Disability Compensation claimants and recipients who either represent themselves or are represented by service organizations would be substantially more successful in either obtaining Death and Disability Compensation or in obtaining an increased percentage of disability compensation. Representation by and the assistance of an attorney in the context of a V.A. Benefit Claim is especially crucial because 38 U.S.C. § 211 provides that a Benefit Claimant or recipient has no right to judicial review of an adverse determination by the V.A. or BVA and because veterans, and spouses and dependents of veterans, are denied by the *Feres* doctrine (arising out of *Feres v. United States*, 340 U.S. 135 (1950)) of the right to bring suit under the Federal Tort Claims Act for any claims arising out of the veteran's period of national service.

49. The original purpose of 38 U.S.C. §§ 3404-3405, the predecessor of which was first enacted in 1862, was to prevent Benefit Claimants and recipients from becoming victims of overreaching and unscrupulous attorneys. At that time Veterans' Compensation was solely in the form of a pension and all that needed to be proved was the veteran's service record. None of the complex problems of proof that exist today in categories of claims such as Atomic Veteran Claims, Agent Orange Claims and Stress Syndrome Claims existed. The historical rationale for the \$10.00 fee limita-

tion is not applicable today, and in operative fact, the present effect of the statutes is to prevent Death and Disability Compensation claimants and recipients from obtaining legal representation and assistance concerning Death and Disability Compensation claims and appeals, thus arbitrarily and without regard to their merit reducing the number of such claims filed and the number of successful claims.

50. Neither the V.A. nor THE UNITED STATES has a legitimate interest in precluding Death and Disability Compensation claimants or recipients from entering into fee contracts with attorneys in an amount in excess of \$10.00. Veterans and Death and Disability Compensation claimants and recipients, unlike minors or incompetents, are as capable as the general populace of protecting themselves against sharp practices. Moreover, far less restrictive alternatives than the \$10.00 fee limitation exist to guard against overreaching by attorneys.

51. The Individual Plaintiffs herein, and members of the Organizational Plaintiffs who are Death and Disability Compensation claimants or recipients, have strong First Amendment interests in freedom to associate with attorneys and petition the V.A. for redress of their grievances, and a Fifth Amendment liberty interest in freedom to contract for legal representation as they see fit. Moreover, many potential and existing Death and Disability Compensation claimants and recipients, including the Individual Plaintiffs and many members of the Organizational Plaintiffs, are, or in the case of applicants, will be, totally or primarily dependent upon such compensation for their support and necessities of life.

52. The limited procedural rights accorded to Death and Disability Compensation claimants and recipients by V.A. regulations described in paragraph 32 are materially impaired or rendered meaningless without the benefit of representation by trained legal counsel, and, as a result, claimants are denied the right to a full and fair hearing. Further, the V.A. encourages unrepresented claimants to waive important procedural rights such as the right to a hearing.

FIRST CLAIM FOR RELIEF

(Declaratory Relief: Procedural Due Process)

53. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52.

54. A present controversy exists between plaintiffs and defendants in that plaintiffs contend and defendants deny that 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the regulations promulgated thereunder, both on their face and as applied to plaintiffs, unconstitutionally infringe upon plaintiffs' property and liberty rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.

55. 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, both on their face and as applied to plaintiffs, are unconstitutional because they deprive plaintiffs of their property and their liberty without affording the due process required by the Due Process Clause of the Fifth Amendment to the United States Constitution.

56. The Individual Plaintiffs and Organizational Plaintiffs herein have been forced to retain counsel to redress the constitutional violations complained of herein, thereby incurring substantial attorneys' fees and costs. In addition to the other relief prayed for herein, plaintiffs are entitled to reasonable attorneys' fees and costs incurred herein pursuant to 28 U.S.C. § 2412 and any other applicable law.

SECOND CLAIM FOR RELIEF

(Declaratory Relief: Substantive Due Process)

57. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52 and 56.

58. A present controversy exists between plaintiffs and defendants in that plaintiffs contend and defendants deny that 38 U.S.C. §§ 3404-3405, and the regulations promulgated thereunder, unconstitutionally infringe upon plain-

tiffs' substantive due process rights protected by the Due Process Clause of the Fifth Amendment of the United States Constitution.

59. 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, have no rational purpose and bear no rational relationship to the purposes behind the Death and Disability Compensation statutes, all in violation of plaintiffs' substantive due process rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF

(Declaratory Relief: Right to Petition V.A. for Redress of Grievances)

60. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52, 56, and 59.

61. A present controversy exists between plaintiffs and defendants in that plaintiffs contend and defendants deny that 38 U.S.C. §§ 3404-3405, and the regulations promulgated thereunder, violate plaintiffs' rights to petition the government for redress of grievances and to effective access to the V.A. as an adjudicative agency protected by the First and Fifth Amendments to the United States Constitution.

62. 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, materially, unreasonably, and unjustifiably impair plaintiffs' ability to present their grievances before the V.A., the only tribunal that can afford them relief, and as a result plaintiffs are deprived of meaningful access to the V.A. in violation of the First and Fifth Amendments to the United States Constitution.

FOURTH CLAIM FOR RELIEF (Injunctive Relief)

63. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52, 56, 59, 61 and 62.

64. The Individual Plaintiffs herein, as well as the members of the Organizational Plaintiffs, will be required to engage in a circuitry of actions if injunctive relief is not granted forbidding the V.A. from enforcing or seeking to enforce the provisions of 38 U.S.C. §§ 3404-3405, and the V.A. regulations promulgated thereunder. Further, absent injunctive relief, they will suffer damages in amounts which will be difficult, if not impossible, to quantify, and will suffer great and irreparable injury.

65. Plaintiffs are entitled to a preliminary and permanent injunction forbidding defendants from enforcing or seeking to enforce the provisions of 38 U.S.C. §§ 3404-3405 and the V.A. regulations promulgated thereunder.

66. To remedy the effects of past and continuing constitutional violations, plaintiffs are entitled to a permanent injunction prohibiting defendants from denying any motion to reconsider any Death and Disability Compensation claim prosecuted heretofore without the services of an attorney and from refusing to award to claimants or recipients whose revived Death and Disability Compensation claims are successful upon reconsideration accrued benefits under 38 U.S.C. § 3021 back to the date of original filing of each such claim.

WHEREFORE, Plaintiffs pray for judgment against defendants, and each of them, as follows:

FIRST CLAIM FOR RELIEF

1. For a declaration that 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, both on their face and as applied to plaintiffs, deprive V.A. Death and Disability Compensation claimants and recipients of their property and/or liberty without due process of law in violation of the Fifth Amendment to the United States Constitution;

2. For reasonable attorneys' fees and costs of suit incurred herein;

3. For such other and further relief as the Court might deem just and proper.

SECOND CLAIM FOR RELIEF

4. For a declaration that 38 U.S.C. §§ 3404-3405, both on their fact and as applied to plaintiffs, and the V.A. regulations promulgated thereunder offend plaintiffs' substantive due process rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution;

5. For reasonable attorneys' fees and costs of suit incurred herein;

6. For such other and further relief as the Court might deem just and proper.

THIRD CLAIM FOR RELIEF

7. For a declaration that 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, deprive plaintiffs of meaningful access to the V.A. and of their right to petition the government for redress of grievances in violation of the First and Fifth Amendments to the United States Constitution;

8. For reasonable attorneys' fees and costs of suit incurred herein;

9. For such other and further relief as the Court might deem just and proper.

FOURTH CLAIM FOR RELIEF

10. For injunctive relief as follows:

(a) for a preliminary and permanent injunction prohibiting defendants from enforcing or seeking to enforce the provisions of 38 U.S.C. §§ 3404-3405 and the V.A. regulations promulgated thereunder;

(b) for a permanent injunction (i) prohibiting defendants from denying any motion to reconsider a claim for Death or Disability Compensation prosecuted heretofore without the services of an attorney and from refusing to award to claim-

ants or recipients whose revived Death and Disability Compensation claims are successful upon reconsideration accrued benefits under 38 U.S.C. § 3021 back to the date of the original filing of each such claim; and (ii) prohibiting the V.A. from failing to advise existing and future V.A. claimants or recipients of the nature of the relief accorded herein;

11. For reasonable attorneys' fees and costs of suit incurred herein;

12. For such other and further relief as the Court might deem just and proper.

Dated: April 13, 1983

MORRISON & FOERSTER
KATHLEEN V. FISHER
GORDON P. ERSPAMER
MICHAEL F. RAM

By /s/GORDON P. ERSPAMER
Attorneys for Plaintiffs

JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury herein of all issues triable thereby.

Dated: April 13, 1983

MORRISON & FOERSTER
KATHLEEN V. FISHER
GORDON P. ERSPAMER
MICHAEL F. RAM

By /s/GORDON P. ERSPAMER
Attorneys for Plaintiffs

EXHIBITS TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

- A. Cordray's Accredited Representative's Statement, May 18, 1978
- B. Maxwell's Original Claim for Disability Compensation
- C. Letter, dated December 5, 1982, from Albert Maxwell to the Veterans Adjudication Board
- D. Maxwell's Statement in Support of Claim, December 2, 1982
- E. Maxwell's Supplemental Statement in Support of Claim, January 4, 1983
- F. Letter, dated January 22, 1982, from the Board of Veterans Appeals to Reason Warehime
- G. Letter, dated April 2, 1981, from T.A. Verrill to Robert T. Dubrow, Jr., Esq.
- H. Letter undated from T.A. Verrill to Reason Warehime
- I. Wilson's Statement in Support of Claim, January 28, 1982
- J. Letter, dated May 5, 1982, from T.A. Verrill to Dorris Wilson
- K. Notice of Decision

EDITOR'S NOTE

PAGES 44 thru 215 WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

VETERANS ADMINISTRATION

STATEMENT OF ACCREDITED REPRESENTATIVE IN APPEALED CASE

TO	SERVICE ORGANIZATION (Name and correspondence symbol)	DATE 5-18-78
LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN CORCORAN DON E		FILE NO. 24042500

All evidence in connection with this appeal has been considered. Please complete and return the statement below on or before the date indicated. If we do not receive either the statement or a request for extension by that date, it will be necessary for us to certify the appeal to the Board of Veterans Appeals on the present record.

REPLY REQUESTED BY (Date) ORGANIZATIONAL ELEMENT MAKING REQUEST (Name and correspondence symbol)

TO BE COMPLETED BY ACCREDITED REPRESENTATIVE

I HEREBY CERTIFY that a statement of the case was furnished; that appellate review is desired on the evidence now of record; and that the issues for consideration of the Board of Veterans Appeals are clearly defined.

☐ I REST THE APPEAL ON THE ANSWER TO THE STATEMENT OF THE CASE AND THE HEARING ON APPEAL (If amended).

☒ I WISH TO MAKE THE FOLLOWING ARGUMENT TO SUPPLEMENT THE ANSWER TO THE STATEMENT OF THE CASE AND OTHER ARGUMENT OF RECORD:

The veteran appeals for service connection for sciatic nerve damage which he contends was caused by insecticides after contamination by atomic fallout. He believes his activities in of many years standing and had its inception during service. The third part of the appeal is for an increased evaluation of his Duodenal ulcer.

COPY
Original Document
On File With The
Veterans Administration
(VAROSF)

(ATTACH ADDITIONAL SHEETS IF NECESSARY)

SIGNATURE AND TITLE OF REPRESENTATIVE

DATE

5/31/78

HEARINGS #1-19-83 11:00am. Hearing Room A

Ben Saccone

SS Geil

Salinas, Ca 93921. 408-422-9491

NAME: ALBERT R. MAXWELL
DATE OF ENLISTMENT: DECEMBER, 1940
DATES AS P.O.W. 4/8/'42 to 9/12/'45
DATE OF DISCHARGE: 12/18/'47
SOCIAL SECURITY # 520-10-1098
SERIAL # 20949094
V.A. "C" # 9-594-221

P.O.W FLAG

A. FLAG FOR P.O.W.

UGERINS ADM. OFFICER

FOR ADVISORY BOARD COMM. ON
FORNER P.O.WS

REFERENCE FOOTNOTES

* Notation of illness.

++++ Memory loss, blackouts.

// Insomnia, Nightmares.

//* Anxiety, stress, mental/emotional trauma.

** Illness and treatment documented by Medical records at
V.A. Hospitals and by V.A. Doctors.

+- Illness and treatment by private physician and civilian
Hospital so designated (location, etc.).

@ Congenital anomalies of Maxwell Children.

495-8064
8065

NAME -- ALBERT R. MAXWELL
 DATE OF BIRTH- 6/12/1920
 DATE OF ENLISTMENT -DEC. 1940
 DATES AS P.O.W. -4/8/'42 to 9/1
 DATE OF DISCHARGE- 12/18/'47
 SOC. SEC. # 520-10-1098
 V.A. "C" # 20949094
 PAGE : OF 21 PAGES.

APPROXIMATE DATE	APPROXIMATE WEIGHT	APPROXIMATE EVENT	COMMENTS
Dec '940	185	National Guard 115 Cavalry Unit Casper, Wyo.	Member of the National Guard 115 Cavalry Unit, stationed in Casper, Wyoming.
Dec 1940	135	U.S. Army 194 Tank Btn. Camp Lewis, Washington.	Our Nat. Guard unit was inducted into the U.S. Army. I am in perfect physical condition. No waivers nor comments of any type.
Feb 1941	185	" " " " (Corporal)	Transferred to the 194 Tank Btn. at Camp Lewis, Wash. I made Corporal!
June 1941	175	Fort Statsenberg, Philippines.	Fort Statsenberg is adjacent to Clark Field. Beautiful here, haven't gotten used to heat. Lost pds. but feel great!
July '1941	130	SERGEANT'.	Made Sergeant! Really love the <u>service</u> , comrades!
Dec 7, 1942	"	PEARL HARBOR BOMBED	The Japanese have attacked us!
Dec 8 1941	"	WAR DECLARED	Our Tank Battalion is deployed around the perime- ter of Clark Field.
Dec 9 '1941		Clark Field Bombed.	MacArthur would not order planes into air, they all completely destroyed -on the ground!
" "		Lingayen Gulf / Rosales / Olongapo / Mariveles / / / / / / Bataan	Our Battalion was in the field, in battle, on the front lines throughout the entire campaign. Fighting from Lingayen Gulf, Rosales, Olongapo, Bataan & Mariveles covering the retreat of all of the Philippine forces.
" "	168		I've had two attacks of Malaria. One in the morn- & again in the afternoon of the same day. I also have dysentery--seems to be a constant thing with all of Feel weak & shaky all the time.
Jan '42	?		Early in the Campaign, ran out of food and medical supplies. Because of this 80% of men had dysentery, 75% Malaria.
Feb '42	155		Cut to 1/2 rations, then to almost nothing other than what we foraged, living off the land. There is nothing that swims, flies, crawls or flies that we wouldn't eat haven't eaten.
			Have sore throat, Splitting headaches, running a fever. Now got Dengue fever? whatever 'that' is.
Feb 14 '42			We're ragged, starved & all of us diseased, but we've beaten back Gen.Homma's 65th Brigade Troops (from 650 men to 1000). We haven't got much of anything else, our morale is high!

NAME-Albert R. Maxwell
 V.A. "C" #20949094
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APPROXIMATE	APPROXIMATE	EVENT	COMMENTS
Feb 22'42	155	Bataan	Pres. Roosevelt's promised us food, medicine, re-enforcements! Help is coming, we can hold!
Feb 26'42	"	HONMA GETS:	Tokyo Rose announced that Japanese re-enforcements have arrived, along with planes, two divisions & artillery & food.
Mar 2'42	"	Hungry! (all the time).	We've been cut to 5/8 rations! Our Forces are dwindling rapidly (about 50 men daily in their foxholes from Malaria & starvation).
Mar 10'42	?	MacArthur Leaves	We're all so weak & dizzy. Dysentary so bad some men can't make it out of foxholes, so lie in their own excrement. We all look like Scarecrows!
Mar 15 "	"	Starvation Diet!!	Wainwright went to Corregidor for food--MacArthur left orders <u>we were to receive none</u> .!??? Save for Corregidor
Mar 18 "	"	"	* I have yellow jaundice, my eyeballs are as yellow as my skin!! Hands & feet are really swollen.
Mar 20	"	"Lt. Gen" Wainwright	Wainwright's appointment is official. God, how we love that man! He was right up there with us on the front lines fighting side by side with us.
21	"	Wainwright in command- Corregidor	His first action there--sent us 'some' food.
Mar 26	"	America's newest Alamo!	* Blinding headaches--what I wouldn't give for an aspirin
Mar 27	"	WE ARE <u>EXPENDABLE!</u> <u>(SO- says)</u> (Tokyo Rose):	President decides it's more important to save England from Germany than to save the Philippines.
"	"	"	Food, medical supplies & re-enforcements are re-routed to Australia.
April 1	"	United Press Correspondent Frank Hewlett writes our <u>Epitaph!</u>	Mac Arthur misled War Department about the number of troops here--they believe us to be 40,000, we are 90,000 plus 11,000 on Corregidor!!??? "We're the Battling Bastards of Bataan, No Mama, No Papa, No Uncle Sam- No Aunts, No Uncles, No Cousins, No Nieces No pills, no planes, no artillery pieces. And 'nobody' gives a damn!" F. Hewlett
Apr 6	"	Last day of battle.	Exhausted, so sick, looks as though we've had it. Forced back to the ocean. Superior forces in number, equipment in front of us, we will have to surrender!!
April 8 '42	"	"BATAAN FALLS!"	Can't BELIEVE this happening to an Army of the United States-but it has, oh, it has. We're all <u>NUMB</u> -no one is speaking at all.

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May 21 '42 " Sick again!

* My feet are so swollen can hardly stand on them, hands too. Fingers look like sausages, the skin so tight looks like it will split. All of my joints pair it's 'wet' beriberi. What next?

Forced to work anyway--those unable to are cut to 1/2 rations and starve to death.

We are repairing airfield.

May '42 " Treatment of prisoners.

* Discovered early my size (6'2") was serious handicap. It produced an almost psychogenic effect on my captors. (Perhaps because of their own small stature) It really disturbed them to have to 'look up' to the enemy. Whatever their problem was, I certainly came in for more physical attention and heavier work assignments.

July '42 " Nose broken.

* Continually slapped & beaten so much across the head and face, my nose has been fractured & broken so often has spread clear across my face. Got a Schnozz like 'Durantes.' Bad nightmares--wake up--and it still is!

Sept '42 " Saber Happy

* The Camp Commandant dislikes us. Every morning at inspection he walks past us ticking across our foreheads with his saber, causing the blood to stream down in our eyes. Then he comes back to me & either stands on a box, or has me kneel so he can slap me across the face. I'll carry the scars of that saber the rest of my life. We're all beginning to look like something out of a Frankenstein movie!

Aug '42 119 Treatment of prisoners.

* Humiliation is their number 1 priority!

They are truly diabolical. They play psychological on any weakness that manifests itself.

Special observation on those who craved cigarettes. Guards would take a couple of puffs on a cigarette, then flip the rest just barely over the fence, then walk away, and the guys would make a dive for them, & be shot for "attempted escape."

Dec '42 " "

When they give those prisoners a choice between food & cigarettes they invariably choose the latter--and starve to death! Our food ration is so low anyway.

Mar 1943 " "

For any infraction of the 'rules' there was a special treatment. They disciplined them by placing them in a 4ft. square box made of bamboo slats placed in the sun. The occupant could neither lie down or stand up, merely remain in a squatting position. They were to remain there for 30 days, with little food or water. No one

* The camp Dr. performed a hemorrhoidectomy with a mesokit knife (they've taken away all his instruments). No anesthetic! I'll never laugh at another 'plie' joke. I wonder if I'll ever laugh at anything anymore?

Operation

Aug 43 " Port Area Manila Bay

* The largest of us were transferred here to work on the docks as stevedores. It is heavy work. Back is really giving me fits--specially when we stand on feet all those hours without a break.

NAME- Albert R. Maxwell
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May '43	"	Ration Procurement	I was assigned to draw rations from the Philippines
June '43	"	Apprehended	The Spanish people there were neutral & exempt from surveillance--so they smuggled what items they could in to us. Anything helps!
July '43	"	BILIBID PRISON	I was intercepted receiving some quinine, crude sugar cane candy & a note with some news on it!
"	"	DEATH SENTENCE	Been sent to Bilibid prison, placed in a cell with a cement floor & receive 1/2 bowl rice, small amount of water a day.
"	"	Missionaries	Sentenced to 45 days heavy confinement prior to being shot!! This is to serve as an example & warning to res
"	"		Used to live from day to day, now it's hour to hour minute to minute.
"	"		Discovered Mormon missionaries, civilians, are in cell next to me. They haven't done anything, but are to be shot the same day as me!
"	"		We've decided we won't have blindfolds. They have such wonderful attitudes--feel like they've completed the Lord's work. Wish I had accomplished all that the have. Been running a fever--have malaria again.
Aug 5 '43	"	Sentence COMMUTED!	Taken out to be executed, the missionaries were shot separately, in two volleys of bullets. I waited for the third round to come. It never came. They started aiming at me for an interminable time, then at a and lowered their rifles & all began laughing & laughing, & said "I wasn't to be shot after all."
Aug 18 (?)	89!!	Cerebral Malaria	I've been told that I was unconscious for over 10 days, and have had cerebral malaria! The worst attack of malaria I've ever had. I weigh 89(!) lbs.
"	"	?	Can't BELIEVE I'm still ALIVE!! (If you can call that living)!! I look like a cadaverous, bald, Abe Lincoln
"	"	"	I'm experiencing a memory loss, find my memory bank is a complete blank to my 15th year! Having trouble retaining anything I'm told. Awful headaches.
"	"	"	Having terrible nightmares, can't sleep, but then I've got lots of company, nobody else can either. Funny thing--can't remember what I do dream about!?
Aug 30 '43	94	"HELL SHIP"	With 1100 hundred other prisoners placed in the hold of a ship. So jammed in that confined space, sat between each others knees. Only sanitary facility was a large wooden tub in middle for communal use.
"	"	"	So hot, stench so offensive, almost impossible to breathe. Given no food nor water, some of the men went mad--tried to drink their own urine & began attacking each other. My Buddy & I managed to sit back-to-back to fight off those who went berserk! We're now reduced to animal behavior. Had no conception of time, day or night, no idea how long it was before we finally reached Japan.

JAME--Albert R. Maxwell
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Aug 6'45	89	HIROSHIMA BOMBED	This morning on our way to work there was a tremendous explosion (naval bombardment we thought). The sky lit up like nothing we had ever seen. Massive clouds. We thought it might be our Navy but our Guard said that they had a new secret weapon they were testing. Sometime later the sky darkened and there was a storm coming from the northwest with a dirty rain accompanying it.
Aug 9 '45	"	NAGASAKI BOMBED	Today there was another of those Japanese experience. The noise wasn't pronounced, but we saw the same type clouds, much later there was threatening weather. The Japanese are jubilant!! Evidently the experiments were a success.
Aug 15'45		Civilian Guards:	There is something going on--our military guards have been replaced by <u>civilians</u> --except for the detail guards. About 24 of us are being sent out on a work detail. We've been taken somewhere here in the Honshu province (about 65 miles or so) to work cleaning up debris. The devastation is terrible. (We think their weapon must've back-fired). This can't have been any sort of bombing raid--nor could it have been a natural disaster! (Or at least nothing I've ever read or heard about could qualify as an explanation for all of this).
Aug 17'45		Work Detail (Clean up)	* I've got some kind of rash all over my arms & legs We were brought back to camp & have not been detailed anymore. We have <u>all civilian personnel</u> now.
Aug 24'45			
Aug 31'45		U.S. FORCES??	Some of the guys overheard the Japanese talking--& think that they've heard rumors that U.S. Forces have landed & are occupying Japan. WOULD THAT IT WERE SO! It's difficult to live without hope, but worse still to get those hopes up & discover it's just another Japanese deception.
Sept. 2'45		?	Nothing else has happened, no bombings, planes or anything.
Sept 7'45		OUR FIGHTER PLANES:	Planes, our fighter planes, flew low over our camp today. About 6 hours later they flew back again and dropped packages to our compound. There was food, clothing and some medical supplies. Everyone went wild; everything is total confusion speculation.
Sept 9'45		LAST CAMP LIBERATED:	Our camp was liberated today by a Company of U.S. Marines. The planes that spotted us were Marine pilots off of a carrier. Nothing was ever a more wonderful sight than those Marines. We must've looked pretty gruesome to THEM--cause they <u>cried</u> when they hugged us.

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18'45 89

Manilla
(Staging Area)
(Camp)

We are here to be de-loused, fumigated & bathed!!!

Those who had retrogressed mentally were separated from us. Thought if the psychiatrists had examined us we'd never get home. They didn't give us psychiatric evaluations like they did when we entered the service.

Given brief physicals. Shortest examination I've had in the service. They were more interested in how much weight & teeth we'd lost, than in how we actually felt physically!?

FOOD!!
(Baby food)

All we ever talked of or dreamed about in concentration camp was food.--Our favorite kinds--dishes our Mothers used to make---what we'd get for first meal if we were ever released. Everybody wanted STEAK & FRIED. We got BABY FOOD, everything strained, as much liquid as possible. Tasted wonderful anyway! (Especially when you considered the alternative (cats, dogs, lizards, rats--or worst of all NOTHING)!

Oct'45

HOSPITAL SHIP
"HOPE"

96

Gained 7 lbs.. feeling much better, except for this rash on upper arms, hands & legs--puffs up, & I itch all over.

Oct'45

Called HOME!

98

This journey home is unbelievable--that's the word for it. Can't believe this is reality not just a dream.

We were allowed to call home. It was a shock on both my part & my folks. I thought I was listed MIA but I'd been declared officially dead. My sister (who raised me) fainted when she heard my voice! When she revived, all she did was cry!

" " " "

Rash has gone but my hands & feet still keep swelling, especially my ~~right~~ hand. Still have 'sweats' & are all still having nightmares (suppose 'cause when we 'do' sleep we think we're still in concentration camp & 'this' is just a dream)! BUT WE ARE GOING HOME

Oct'45

GOLDEN GATE
BRIDGE

Most 'beautiful sight' I've ever seen, that fantasy span of the Golden Gate Bridge & standing on the deck as we passed under it. Then SAN FRANCISCO & HOME!

" "

San Francisco
The PRESS!

"

Reporters were waiting for our ship to dock--but they've been denied access to us, told 'not to photograph us. 'We' were told not to discuss our captivity nor treatment except with our families.

"WHO" wants to "TALK" ABOUT IT?? "WE LIVED IT!"

(They managed to get shots & some films ~~any~~ how, m (folks SAW them--We never did--didn't care to.

We afterwards learned that they didn't want to include public opinion or reaction because "it was going to be difficult to set up some type of government for the people of Japan." "And after all the war WAS over, we should just 'FORGET IT!' IF ONLY WE CAN!"

NY 45 100 The Presidio-S.F. Calif.

That we'd be- here for a long 'weighing in' type of of procedure, but just given another brief, cursory examination. We were only here a couple of days.

Nov '45 . 115
Camp Carson
Colorado
(Peterson Field)

Allowed to go into Colorado Springs today. Everything so beautiful—'normal' & 'unchanged.' 'I've' changed so that I expect everyone & everything to be altered in some fashion also.

Such a contrast to the last 4 years! Thank God all the horror of death, starvation atrocities, man's inhumanity to man never touched these shores.

I've lived with 'death' as a 'daily companion' and 'life' on a 'holding' pattern for so long I'm finding it difficult to cope. Thought just being back was an instant 'cure-all' (panacea) for all my problems. Not so!

Dec '45 120 Casper, Wyo.

Went home on leave to Casper (my home town). My folks have really gone through hell worrying about me. Everytime my Sister looks at me, she cries. Says I've changed so, how terrible I look, and feeds me six time a day! They start reminiscing & are 'really' upset when I can't recall events or remember the people they invite over to 'see' me.

134 "

" " Evanston, Wyo.

Visiting here, I took the car out for a drive, got the 'shakes,' blacked out & hit a tree. Luckily no one injured. Had another attack of malaria. Scared my fo to death! They didn't say anything about the car!

SALT LAKE CITY
"Incident"

Told me to the Dr., he checked me over and said I a 'impotent & sterile!' We'd been told to expect that.

Told folks had to do Xmas shopping. 'Had' to get awz So nervous I'm griv'ing myself & everyone else crazy.

Staying at Hotel Utah, there is a 'laughing' Santa Claus in the window of ZOML that goes 24 hours! Driving me nuts!

I put on 'civilian clothes', went to the Beau Brummel Restaurant. It was really crowded. I was seated on the mezzanine reading a menu when the waitress asked if I would 'share' the table. I said yes, & when I looked up, seated across from me was a Japanese person. In that split second, he 'became' every guard who'd ever humiliated, degraded, mistreated or tortured me in the last 4 years.

I began to tremble all over, & asked if he wouldn't please leave. He said 'no, he wouldn't', then added 'who in the Hell do you think you are, you 4F'er! (a draft term for those who didn't qualify for service).

We both stood up. I must've gone 'berserk', I hit him so hard that I knocked him over the railing (break it) and onto the downstairs eating area!

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Dec'45 " Salt Lake City,
Utah

I was taken to the Police station where I told them nothing. Finally one of the Officers noticed my 'dog tag' & called Ft. Douglas.

I was taken there & placed under observation for four days (which kept me there over Xmas)!

When my Army records, P.O.W. status established & verified, the Psychiatrist felt that given my circumstances my behavior was understandable, & predictable I was released. There were no charges pressed against me.

I had waited for 5 years to spend Xmas with my family. They'd planned a big celebration & I'd spent it in a psychiatric ward! I was too ashamed to tell them what really happened, so told them my leave was canceled.

This taught me two 'object' lessons- first, that the civilian life I'd so deparately wanted was NOT for me. I simply couldn't adjust to "it," nor 'CIVILIANS!' Second That I must learn to contain myself physically and emotionally as well as I'd done in prison camp. Just because I'm home doesn't give me license to vent my anger & frustration on those about me (& I seem to be filled with so much of both)! Worse, it surfaces any time I'm in close proximity to 'any' Oriental person (I know this to be unreasonable--& I've since learned that most Japanese Americans here at home were inter themselves)! But my reason seems to desert me when need it most.

##

Feb'45 160 Ft. Douglas,
Utah

Re-enlisted. Been put on 'limited' duty, Recruiting. Given my choice of location in the 9th Corps Area, I chose Ogden, Utah. Why, I don't know, probably because I didn't KNOW ANYONE there at all.

#

Mar'45 175 Ogden, Utah

Gained 15 lbs. in a month!

Love this duty & the Army. They seem to be impressed with my Recruiting performance.

Find I'm still not at 'ease' out socially yet.

* Still have trouble sleeping--when I do, wake myself screaming.

* On my feet for any length of time, experience = se-
cramps or Charlie horses at night, in legs & feet.

Apr'45 " " "

My co-workers are all seasoned military career men & great to work with. Captain has quite a 'plithy' vocabulary, but comical. The other Sergeant here is of the finest men I've served with yet. He was awarded Congressional Medal of Honor. He doesn't mention it & I don't ask. His only comment to me about my service "I hear you were a Japanese P.O.W." I said 'yes', he shook my hand, & that was that. We have a good rapport. I think I've found my niche!

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" COMMENDATION

I received a commendation today for the highest number of enlistments during the last three months of entire western district.

So tired all the time, can't seem to ever get enough rest. Guess it's 'cause I don't sleep well.

" "THE GIRL"

Have had absolutely no desire to 'socialize' at a 'till now. I've always had a vivid mental 'picture' of my dream girl. And I've actually met the 'real thing' right down to the last detail! It's unbelievable!

For the first time I'm actually looking forward, instead of backwards. Her name is Jackie.

Took me forever to meet Jackie, now I have, I've almost 'blown' it by my 'irrational' behavior. (Her words)

First date, went to movie & we were seated by some Japanese people. I wanted to leave & made the mistake of telling her 'why.' (without explaining what prompts She thinks I'm a 'bigot!') (One of her best friends Japanese)! Very cool towards me for a week!

" Incidents???

Picked her up for a date. As we were leaving, the neighborhood 'pet' dog was killed in the street. She dashed out, picked it up, got blood all over her dress. I got mad, told her that it was a 'stupid' thing to 'cause she'd ruined her dress. She cried and told me that I was 'insensitive' & 'unfeeling' & she never wanted to see me again! (I haven't looked upon a dog or a cat as a 'pet' for so long, only as something to eat)! How in the world can I tell her that, with the way she feels about animals??

Our relationship's gone from bad to worse.

I also committed a big 'faux pas' without knowing when I first met her father, he said 'it's nice to see you again?!!' I'd been in her home, met her Father, tried to recruit her brother for the service (didn't 'cause he already had an appointment to West Point), didn't remember any of it, other than he 'looked' a little familiar! He also said that I'd looked at a picture of Jackie & told him that she looked just like the girl I wanted to marry!! No wonder I had such a clear picture of her! I tried to 'cover' up that I'd forgotten the whole thing, but he knew--& I think he was worried. HE'S worried?? I'M FRANTIC! I CAN'T TALK about it yet, & I know she deserves to know the truth

"Memory Blackout"

Her darling little Mother seems to 'sense' that there is an explanation. If it weren't for her, I'm sure Jackie wouldn't ever see me again. Her Mom must really done some talking, (to give me an another character)

I 'forgot' two dates with Jackie! She thinks I'm thoughtless & uncaring, that I don't love her. She doesn't want to see me again!

I went out to her house to try & explain 'what' 'causes me to 'do' these things. She wasn't there.

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June 46 155 TALKED:

I was so depressed, and I started talking with Jackie's father, & I broke down completely. I must've talked for three hours, and cried for the first time in almost 4 years. Felt like I was drained. He showed interest & compassion, not pity. Said he & her mother would explain everything to Jackie. (I couldn't go through that again--it brings back everything too vividly). I had nightmares all that night again. I've lost 20 lbs. over the last two months.

Jackie bought me a special 'pocket' diary to carry with me to use 'in lieu' of my imperfect memory. To 'jot down' a few 'dates' & events like a possible WEDDING date. She didn't want to be left at the altar because I'd forgotten what day & where it was to be.

It has helped considerably. Don't know why I didn't think of it before. It would've saved a lot of heartaches & misunderstanding.

Oct'17'46 174 WEDDING DAY:
 Logan, Utah.

We're married in Jackie's home town, by her Bishop. She's Mormon, like the two Missionaries I met in Bilib. I'm being baptized into this church, & someday we will be re-married in the Temple.

Dec'46 160 Ogden, Utah

My weight seems to go up & down like a yo-yo.

Feb'47 170 "

I was examined today. We both really want children. Told that I was still sterile, and might always be so! We're both crushed!

May'47 175 SAN FRANCISCO,
 CALIFORNIA

As an Ex-POW I was given a two-week all expense paid anywhere we wanted to go. We chose San Francisco & the Fairmont Hotel, because it's our favorite place in the whole world.

After ten days I had a terrible attack of Malaria, lost 25 lbs in next 7 days. They flew me to Madigan General Hospital. I'm stationed on Whidby Island, Was

Aug'47 " Whidby Island
 Wash.
 (79 Amphibious)
 (Track Co).

Been missing work a lot, feeling really miserable. Having absolutely 'awful' headaches! Eye is giving me fits!

They've decided to operate on my eyes, although the Doctors say that the left eye has really atrophied.

Sept'47 " Madigan General
 Hospital

Eye operation. Had 'egg shell' cups over my eyes 4 days. Jane Russell came to visit our Hospital & I couldn't even SEE her! (She sat on my bed & talked to me though).

Dec'47 " " MEDICAL
 DISCHARGE
 (50% Disability)

Doctors have decided that I'm not 'physically fit' for Army duty. They have Discharged me with a 50% disability compensation for 'Residuals of Beriberi, Malaria, Shrapnel injury to right ankle, Optic Atrophy & Conjunctivitis & diminishing eyesight of the-left-eye.'

I don't have any idea of what I'm going to do now. I had wanted the Army as a career.

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Dec'47 175 Ogden, Utah

Wonderful news--I am no longer sterile--& we are expecting a baby! Don't think either of us was ever happy.

New Job.

I have a job, Selling of course. What ever I sell I deliver. On my feet a lot & it's heavy work but I've never been happier. (I deliver cases of White Rock & Pabst Blue Ribbon Beer). I have my own delivery truck.

Jan'47 " COLLEGE

I'm going to Weber State at night, majoring in Put Relations!

Mar 48 165

My lower back is really bothering me. I've notice my stomach & abdominal area is really 'tender,'

Jackie insisted I visit their family Dr. He examined & told me I shouldn't be doing so much lifting. He also said that I had all the makings of a real 'rice-belly' because of my extreme malnutrition. She told him about my nightmares and he suggested some medication to help me sleep. He also thought I appeared to be very nervous. Attributed to 'not enough sleep.'

July 14'48 178 BABY GIRL:

We have the most beautiful baby girl, lots of black hair, 'enormous' big blue eyes & dimples. 6 pds. 7oz. Naming her "Paulette" after Jackie's sweet Mom. Jackie had real difficulties delivering.

Congenital Anomalies:

Our baby has a rare heart abnormality called "Tetralogy of Fallot." (A combination of four concurrent symptoms or defects)! She also had a misplaced rectum which they have corrected surgically. They have told us she probably won't live much longer than year! (Can't conceive of a life without her).

Aug'48 185 "

They have put us through the 'wringer' with all of their questions. They repeatedly asked Jackie if she had undergone x-rays, or been exposed to radiation.

All strongly suggest we consider having another baby right away. This type of thing would never happen again.

Sept 24'48 "

It's been so hot--I've had a really bad attack of Malaria, almost 'out of my skull with headaches.

Jackie's truly angry with me because I won't check into the V.A. Hospital. They'd only put me under observation, give me complete bed rest, & give me Quinine or-Atabrine. They've given me both to take when needed, so I'm staying at home, & 'sweating' it out.

Oct 14'48 "

Our baby is really a 'Daddy's girl.' She dimples everytime I even look at her & gets so excited when I walk towards her she hiccups. When I pick her up she 'chuck' out loud, & only 3 months old. Has a tooth at this age! She has my whole heart in those tiny hands.

Dec'48 "

Paulette has filled our whole life with joy, she is such a 'charmer', with those smiles & dimples & a very happy, sunny disposition. A real 'giggler!' Dainty.

Jan'49 "

(Can't conceive life with out her).

Feb 15'49 190

Nervous, eating compulsively, gained more weight. Checked in V.A. Said my eye not correctible. Dr. Beac

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Sept 3'49	"	<u>LOST OUR BABY</u>	Desolate! Our baby was 1/1 one day & gone the next. Try to think of it as a blessing for her sake, so she won't have to suffer. But all I can think of <u>she is GONE!</u> This pain surpasses anything I've <u>ever</u> endured. Am so worried about Jackie.
Sept 10'49	"	Sick :	* Nightmares, headaches this past whole week. Have slept since Paulette died. Sick.
Dec'49	174		* Another attack of Malaria.
Feb'50	180	Another Baby	* I've lost 20 lbs.
May'50	185		We are going to have another baby. This time the will take it Caesarean section for her sake & baby a
			Have a new job, selling again. Automobiles, no lifting, am doing well enough to buy new home. Am fixing up nursery. Like a new lease on life.
June 13'50	"	BABY BOY!	Husky little boy, three(?) blonde hairs on his head weighs 8 lbs. 10 oz. Named him <u>Michael Birch Maxwell</u> Born on his Grandfather's birthday.
"	"	CONGENITAL ANOMALIES "AGAIN"	Welghed today at the hospital-gained 15 lbs! Against impossible odds, our baby has "tetralogy of fallot." Doctors say they've never known another such occurrence! We're stunned! Doctors have come all over to examine both of us, Michael & Paulette's medical records, trying to determine the possible cause.
Jun'50	"	Some hope.	Questioned all older members of both families, (I'm youngest of seven children who've produced some 52 offspring, all of whom are normal, also 12 grandchildren, likewise)! No history of <u>any abnormalities!</u> Jackie's family has <u>genealogy records & family histories</u> going back two-hundred years, with listings of ailments, deaths, etc. NO ANOMALIES!
"	"	Sick Went to V.A.	Michael has an otherwise healthy body. They tell us not to give up hope. We'll try to prolong his life, hoping for a successful operation to be developed.
Aug'50	"	MICHAEL'S OPERATION	** I've had another attack of Malaria, I finally went to V.A. Hospital. All they did was examine me, & send me to Dr.C.S. Evans, he said my left eye seemed very dilated with a diminished vibratory sense, able to sense movement only. * They've been monitoring Mike carefully & discovered he has 'premature 'showings' of Hydrocephalus. They are going to operate on him, remove a kidney & insert a catheter that will draw off the excess fluid from the brain. It's really terrible risky, because of his health.
Sept'50	"	"	Operation is a complete success. They are showing films of it at the Boston Medical Convention!

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"	Second Job.		Mikie will be hospitalized for <u>3 months time!</u> I've gotten a night job to try to supplement our income.
June 29'51	225	V.A. Hospital	** My back & lower spine are really giving me pain! Dr. W.H. Wright says it's arthritis of lumbar spine!
July 4'51	"	Another Baby Girl! (not planned):	A 'perfect' baby girl, perfect heart, the most gorgeous baby I've ever seen! The whole hospital staff think so too. Doctors have come in from all over to examine her, because of the condition of the last two. They are all so thrilled for us. She is such a 'doll' (looks like her Mother). Has little dark curls, big dark eyes, & dimples--all over her body--she only weighed 5 lbs. 14 oz- 18 inches long, but she's really a 'chubb.'
July 7'51	"	GONE!	We are all on cloud '9' For some reason Jackie is convinced that all is not 'right,' even tho' the Drs. have assured us that she is 'perfect.' Named her Mich
July 7'51	"	Sick-again.	Our 'perfect' baby girl died today! Doctors were all stunned. She developed breathing problems & quit literally 'smothered' to death. Diagnosis "Atelectasis of the lungs." Another congenital abnormality! The Drs. did say that at least it proved we could have a normal baby---(that sometimes these cases were produced by prematurity. She was <u>two weeks</u> early).
July 7'51	"	Malaria	I've been so bitter, so full of hurt & pain. If it weren't for Jackie & Mikie I really wouldn't want to live! Life is so precious & hard to come by, that I never thought I'd feel this way. But I do. Can't eat nor sleep! The nightmares & headaches are back again
Aug'51	"	Medical conference.	Have had another attack of Malaria. We've spent two whole days, going over all records available to us, the Doctors are baffled! They've said since there is no previous medical history on either side of abnormalities, that it was 'just one of those things!!!' In reviewing my service medical records they were truly 'upset' that I hadn't mentioned my having been in Japan when the Atomic bombs were dropped there. Wanted to know 'if I had been in the area' (I had), 'I'd spent any time there' (I had) had worked in the area' (I'd been detailed there to clean up 'debris'). "Had I injected any food or water while there" (I had). "Had I had any 'ill effects' manifest themselves during the time?" I'd had an awful 'rash' of some sort, that came & went. I hadn't had it for some time.
"	"	NO MORE CHILDREN!	In view of all the above, they strongly advised us to have no more children. We'd (or I'd) already decided that because Jackie almost lost her life each time with Caesareans. Her doctor was terribly concerned about

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Dec 18'51	"	V.A. Hospital	**	My left eye is really twitching, quivering all the t Diagnosis--more rest to alleviate eye strain," prescribe dark glasses. Dr.Beadle(?)
June'53	220	Malaria	*	First attack I've had in 2 yrs. time! Lost 22 pds. Having a lot of stomach discomfort, lots of gas. Jack thinks I'm getting an ulcer. That's all I need. I feel like a 'hypochondriac' I have so many aches & pa
June'55	200	Las Vegas, Nevada.	+	Went to Las Vegas to be witness at my cousin's wedding. The temperature was 110. Got a severe sun- burn. Began having chills & fever, had another attack of Malaria. Jackie had to bring me home.(Dr. Payne)
July'55	"	Logan, UT. Mikies operation.		They have done a 'catheterization' on Mike, prior to operating on him in Sept. He's doing so well now. Walking, talking, just learned to swim 2 weeks ago, that we really fluctuated concerning the heart operati But have decided to go ahead with it.
Aug 5'55	"	"MIKIE'S GONE!"		Mike was ill yesterday, is gone today! (Just like Paulette)! We are both still in a state of shock!! He had beaten all the odds in cases like his, for longevity, progress, etc. We'd tried never to get our hopes 'up' for his future--but we've fought so long & hard to give him his chance (especially Jackie). I'm really concerned for her. Before <u>she</u> was the 'strong' one. Not so this time.
Aug 8'55	"	Malaria	*	I've had another attack of Malaria. Headaches fier
Nov 11'55	220	V.A. Hospital	**	Pains in chest area, fever. X-rays showed 'mucous" Diagnosis--- (Dr. Varo, Dr.Dovey). "Some type of viral infection, cause undetermined."
Jan'56	"			Jackie & I've had the only serious quarrel of our married life. She wants another <u>BABY</u> ! "I don't!" Her Dr. doesn't want us to even consider it. Said he'd already told her that he wouldn't take care of her if she did become pregnant! That maybe <u>she</u> could go thru it again, but <u>he</u> couldn't!
April'56	"	HAVING A <u>BABY</u> !		Jackie has convinced both <u>me</u> & the Drs. to go along with her wishes. If <u>she</u> has that much faith, I guess all of us should do likewise. First time <u>she</u> has 'fel- that the baby <u>would</u> be alright! She will try to carry the baby over the 9 months to give it a better chance. The Dr. worries about a possible rupture of the uterine wall, but is watching her 'daily' the last 2 months.
Jan 9'57	"	ROBYN KELLY MAXWELL		Drs. all love my wife, they've called our new little girl "Beauty's Beautyf" She was 2 days shy of 10 month weighed a whopping 10 pds. Looks like a 2 month old baby. Run every conceivable test on her. Everything i NORMAL! She's darling, blue-blue eyes, red gold hair. HEALTHY---and all ours. My cup runneth over! I'll have to listen to 'I told you so' the rest of my life. And 'I' didn't want another baby! Thank God for her!

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Jan '58	230	SELF EMPLOYED!	
Feb '58	"	TURNED DOWN FOR MORTGAGE & LIFE INS.	+++ I have gone into Real Estate. Glad I'm able to so. Can work at my own pace. This way when I have miss work because of illness I can make it up when feel well.
Sept 26 '59	"	V.A. Hospital	Bought another new house, was turned down today Mortgage & Life Insurance! They conducted their own examinations. Am worried about my family's future security! (Varicose veins Bad. Had vein ligated. ON LEFT LEG)
" " /	"	" /	Having those 'same type' chest pains I had a couple of years ago. X-rays & thorough examination by Dr. Craddock & Dr. Romney. Ran tests for three days. Diagnosis--"undetermined," not Cardiac though.
Sept 30 '58	"	"	
Feb '59	"	Sick	" Another attack of Malaria. My hands & feet are swollen, & are numb periodically again.
Mar 3 '59	"	V.A. Hospital	** Edema, numbness of extremities, recurrent 'right Lumbar' pain. Thickening & redness of eyelid margin suggest "chronic blepharitis." Dr. J.H. Latimer.
Aug 17 '61	"	V.A. Hospital	** Completely Fatigued. Missed 3 weeks work. Extre pain in chest wall. X-rayed. "Not cardiac." Dr. Rom
Aug 22 '61	"	ANOTHER BABY! Rebecca Maxwell	Robyn has been so beautifully healthy, decided to try again. Another beautiful dark haired baby girl. Jackie was unable to carry the baby the ten months + they'd planned upon. Premature 2 weeks. Weighed 5' Lived the same amount of time as Michele. Died with same ailment! Atelectasis of the lungs!
Aug 26 '61	"	GONE! CONGENITAL ANOMALY? V.A. Hospital	@ Heartsick, completely fatigued. Diarrhea, burnin' sensation when voiding. Some chest pain still. Che heart again. It's Ok. C.V.A. tenderness. Dr. Romne
June '62	"	Chest Pains.	+* Agonizing chest pains, thought I was having heart attack. Dr. Thomson feels they are 'severe muscle spasms' caused by complete lack of calcium, due to the extreme malnutrition I'd suffered.
Dec '62	"	Headaches & Insomnia	* Not sleeping, having night 'sweats' & headaches ac Nervous, & gastric distress.
Mar '63	"	Sick	* Chills & fever & 'sweats.'
June '64	"	"	" " & swelling of hands & feet.
Sep '64	"	Chest pains.	+* Dr. Thomson still feels I'm experiencing calcium spasms. Says they'll probably increase in intensity I get older!??
April '65	"	Insomnia	* Seem to have 'chronic' insomnia. Am awfully nervoi Stomach aches. Headaches always.
Mar 29 '66	"	V.A. Hospital	** Eyes really bothering me. Dr. Sontag treated me.
Sept 27 '66	"	" " "	** Dental check up.

NAME--Albert R. Maxwell
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Date	Event	Notes
May 19'71	Unable to Work	Severe fatigue & headaches. Unable to concentrate or work.
Nov 11'71	Allergies	Allergies are giving me fits, rashes & hayfever.
Mar 17'72	Sick again	Chest pains, headaches. Prescribed Vallum at onset of pains.
Dec 4'72	V.A. Hospital	Headaches!!! Soooo- nervous, insomnia. Dr. Taylor Tension, can't turn it off anymore.
Mar'73	Malaria again. +*	Had an attack of Malaria. Atebrine prescribed by Dr. Thomson.
Mar7'73	V.A. Hospital **	Fever & chills. Remains feverish.
" 9"	/	"Etiology undetermined." Dr. Tave
" 12'73	/	
May 16'73	V. A. Hospital **	Eyes are scratchy, bloodshot, headaches. Changed lenses. Dr. Sontaag
Aug 14'73	V.A. Hospital **	Pains in chest. Fever (low-grade)
" 27 "	/	Still running fever.
" 31 "	/	"Etiology undetermined." Dr. Taylor
Sept 27"	/	Another attack, same symptoms. Liver scan for abscess or Hemochromatosis.
	**	"Etiology undetermined." Dr. Hallide.
Feb 6'74	V.A. Hospital **	Pain in right shoulder some muscle spasms when tes for pressure. No chills nor fever. Zyllocaine relief somewhat. "Probably tension Myositis." Dr. Taylor
Mar 2'74	Dee-McKay Hosp.+*	Back pains still bothering me badly. Dr. Carl Mat ran x-rays, believes I've an Injured or slipped disc. Dr. Car Mattson Orthopedic Surgeon.
Mar 9'74	V.A. Hospital **	Back is giving me fits. Am scheduled for the Neurc clinic on 4/9/74. Dr. Taylor
" 19'74	/	Am having some numbness along lateral sides.
" 21' "	/	
	/	
		This Dr. thinks it's all in my head, that I'll just have to learn to deal with it. (asked for early medical help gave it to him, then felt 'I felt' it to be more pertinent it was)! Asked if I'd seen a Psychiatrist! (I'd be glad to do so, anything to be rid of this pain!)
Apr 9'74	V.A. Hospital **	"Dr. Oliverio" Heat packs & muscle relaxants prescribed.
May 15'74	Back to work	Heat packs & complete bed rest really helped. Feel much better.
Oct 12'74	NERVES!	Really nervous. Headaches bad. Insomnia, nightmares
Mar 5'75	FEELING GOOD!	Worked 6 months straight without having to take any off. WONDERFUL!!

NAME--Albert R. Maxwell
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Date	Location	Notes
Oct 2 '75	V.A. Hospital	Headaches back. Aggravated!!
Oct 9 '76	/	" " " " changed Rx to Darvon. Dr. Taylor
May 10 '76	/	Allergies, aggravated hay fever. Changed Rx so I wouldn't be sleepy while driving. Dr. Taylor
Aug 5 '76	/	'Extremely' nervous. No sleep for weeks. Dr. Taylor
Jan 19 '77	/	Chest pains again!! Lower left chest. Can't breathe without pain. "X-rays showed disc atelectasis on field bone." Dr. Hosely
July '77	FEELING GOOD	Worked another six month stretch, no time off. They are looking better!
Nov 3 '77	V.A. Hospital	Have had intermittent pains in my heel for couple months. X-rayed, found calcaneal "plantar fasciitis" Dr. Jackson
Mar '78	Stomach pains.	Much pain, gastric discomfort after meals. " " " and at night
June '78	"	"
Oct 20 '78	V.A. Hospital	"Peptic ulcer with a diagnosed duodenal ulcer-(diverticulum) by upper GI. Has Hematemesis." Recorded by Dr. Bennett
Mar 4 '79	SWEATS!	Sweats, fevers & chills. Insomnia.
Aug 12 '79	Back pains.	Severe back pains (lower back). They think it's in my 'head.' Could be--I have enough headaches!
May 13 '80	V.A. Hospital	Hip, back & shoulder pains. Can't sleep, too much discomfort. "Treating me for arthritis." Dr. Romney (At least HE believes the pain is real!)
Sept 29 '80	V.A. Hospital	Still the same symptoms!! Dr. Romney
Oct 28 '80	V.A. Hospital	Fever & chills and night 'sweats.' Dr. Romney
Jan. 14 '81	St. Benedict's Hospital Ogden, Ut.	Emergency entrance. Bad fall on buttocks & back!! (anywhere but on my BACK) Lost consciousness. Had a 5 day period of Renal failure--the blow so severe. Hospitalized 2 weeks. (Dr. Stratford--Dr. Packard)--X-rays showed "degenerative joint disease of shoulder back."
April 6 '81	V.A. Hospital	Extreme pain radiating through buttocks & groin. X-rays showed "fracture of L1 lumbrosacral spine," also showed "2 densities on left consistent with renal stone or calcified nodes." Dr. Jensen
Oct '81	V.A. Hospital	Pain now intense throughout hip, back, buttocks. Hip x-ray show 'hot' spot on pelvis. Dr. Bennett & Dr. Jensen.
Nov '81	/	"Violent, extreme Urticaria."
/	/	Bone Marrow biopsy & aspirate
/	/	Bone scan
/	/	Bone survey
Dec 12 '81	/	Diagnosis-- "Multiple Myeloma.!" Dr. Fredrick Gibbs & Dr. Black

NAME--Albert R. Maxwell
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			Hematology clinic.
Jan 9'82	"	V.A. Hospital ** (University of Ut).	
Jan 25'82	"	V.A. Hospital **	Chest Wall Pains, Acute distress. Upper respirat. track infection. Urticarial vasculitis angioedema. Chest x-rays. X-rays comparison with 11/9/81 show an Enlarged Heart! Dr. Futrell Sleeping problems while in hospital. Dr. Talone
Feb 3'82	"	V.A. Hospital *	
Feb 4'82	"	/	
Mar 16'82	"	/	
Mar 25'82	"	(University-Ut). **	Patient has "degenerative disc disease & bibasilar atelectasis." Dr. Hackman
" 26'82	"	V. A. Hospital **	Hematology. Abdominal pains again. Possible renal stone. Dr. Jensen - Hackman
April 7'82	"	/	Degenerative change of the Thoracic spine. Dr. Hackman
Aug 13'82	"	PALO ALTO V.A. ** HOSPITAL	Residing here with our daughter while searching f our own residence. I became ill with chills, fever cough. I reported to V.A. Hospital in Palo Alto. Chest showed congestion. Antibiotics. Dr. Smith.
(Visiting my Folks).	"	Ft.Collins, ** Colorado (Poudre Valley) (Hospital)	Emergency entrance to Poudre Valley Hospital for suspected kidney stones. On orders of Dr. transferr to V.A. Hospital in Denver, Colorado. Dr. Abbey
	"	V.A. Hospital ** Denver, Colo.	Kidney stone diagnosis confirmed by nuclear scan. Dr.? Chief Urologist.
	"	**	Continuing Hematology treatment therapy.

To whom it may concern:

I, Senior Master Sgt. Albert L. Leach (Ret). do hereby attest and affirm that as survivors of the 'Bataan death march', Sgt. Albert R. Maxwell and myself were among other prisoners of war who were transported on one of the 'infamous' 'hell-ships' to the island of Japan.

We were incarcerated in the concentration Camp # 6 at Nagoya, Japan in the Honshu Province, in September of 1943. We remained there for a period of two years time.

During that time we witnessed the Atomic bombings of Hiroshima on August 6, 1945, and Nagasaki, Japn on August 9, 1945 with the subsequent "black-rains" and 'fallouts' thereafter (although we thought that they were Naval bombardments and extremely unfavorable weather conditions following the action). We were later told that the 'weather' we were experiencing at this time was indeed "fallouts" from the Atomic bombing.

We were one of the last camps to be located and liberated. Our liberation occurred during the week of September 2, to September 9, 1945.

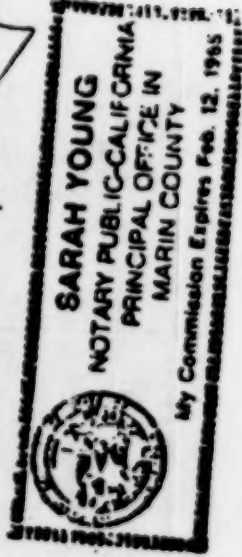
All of the above deposition I do solemnly swear, and testify thereto.

Albert L. Leach

Senior Master Sgt. Albert L. Leach
Serial-# 6274624
Soc. Sec. # 520-09-7211

Present Address- 69 Cambridge Heights
Novato, California
74749

Sarah Young



**RADIATION
RESEARCH
INSTITUTE**

November 18, 1982

To Whom It May Concern:

I first saw Mr. Albert R. Maxwell on October 22, 1982. Mr. Maxwell is a former prisoner-of-war who was diagnosed with multiple myeloma in October 1981. It is my opinion that the chance that Mr. Maxwell's multiple myeloma was caused by his radiation exposure in the service is beyond a "reasonable doubt."

Mr. Maxwell is a 62-year-old veteran who was a prisoner-of-war at Nagoya Camp Six in Japan from 1941 to September 1945. At the time of the atomic bombing of Hiroshima on August 6, 1945, he was in Nagoya, about 80 miles from Hiroshima, and recalls "black rain" over the city following the bombing. A few days after the bombing, he was sent into Hiroshima to help clean up debris off the roads. He used his bare hands as tools and wore no protective clothing. He was sent into the bombed areas 2-3 times for a day at a time over a period of 2-3 weeks. He drank the water there and ate food cooked in the open in large iron pots. About 7-10 days after he had first begun to work in the clean-up, he developed nausea and itching, welts, and blisters to his skin.

Mr. Maxwell was diagnosed with multiple myeloma when lytic bone lesions were found on a bone scan in October 1981. Soon after, a bone marrow examination confirmed the diagnosis. He has had two series of radiation treatments and is undergoing chemotherapy with Cytosan and prednisone.

As you know, the Federal Government includes multiple myeloma in its second category of radiation-induced cancers -- those cancers whose association with ionizing radiation appear "meaningful" (Federal Register, December 31, 1981). The increased incidence of myeloma found in the Hanford mortality study (Mancuso, Health Physics, 33(5), 1977) suggests that the myeloma risk at low levels of radiation is greater than previously estimated.

It is my understanding from a Defense Nuclear Agency report (August 12, 1980) that there have been five (5) confirmed cases of multiple myeloma among the 1,000 Marines who were involved in ground-zero clean-up operations at Nagasaki in late September 1945. The Defense Nuclear Agency has entered into a contract with the National Academy of Sciences to conduct a mortality/morbidity study on the individuals participating in the occupation of Hiroshima and Nagasaki.

Due to the fact that Mr. Maxwell is a former prisoner-of-war who was exposed to an unknown but most probably a very considerable amount of radiation in the clean-up of the atomic bomb debris, and due to the fact that he has multiple myeloma, a cancer that has a definite association with ionizing radiation, it is beyond a "reasonable doubt" that his myeloma is due to his radiation exposure.

Sincerely,

Susan D. Lambert, M.D., M.P.H.

Susan D. Lambert, M.D., M.P.H..

sdl:sas

State of California } ss.
County of Alameda }

On this 22nd day of November 1982, before me,

Joan C. Klatt

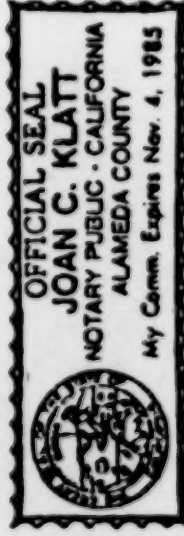
the undersigned Notary Public, personally appeared

Susan D. Lambert

personally known to me

XX proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that she executed it. WITNESS my hand and official seal.



Joan C. Klatt
Notary's Signature

American Ex-Prisoners of War



11-10-62

TO WHOM IT MAY CONCERN:

re: Albert R. Maxwell
SSN 520-10-1098

In my interview with Mr. Maxwell in September of 1962, it was discovered he suffers from many of the stressors common to former prisoners of war of the far east.

The fact that he has been unable to remain on one job for any length of time has been examined. It was discovered that there are numerous experiences that have caused flashbacks to life threatening events he experienced while a P.O.W. These have been found to be conditions that he believes can only be eliminated by moving on, one job to another or to a new area where he thinks these situations can be avoided. Most of the incidences that are a source of irritation to Mr. Maxwell are trivial and would be unnoticed by the average person.

Going to bed with these things on his mind prevents him from getting a good night's sleep, or wakes several times during the night making him tired and irritable the next day. This has caused him to isolate himself socially, and more than normal in the business environment much to his financial disadvantage. When he does sleep, he is subjected to frequent nightmares that have led to an overabundance of stress, as they always relate to his prison camp experience.

The prognosis for Mr. Maxwell is poor, as many studies, including the one recently made by the V.A. has shown these problems to become more pronounced in the latter years.

A list of the studies referred to above are available on request.

Sincerely,

Lew Hastings

Lew Hastings
Psych. services

LEW HASTINGS, Ph. D.

National Service Advisor

8191 Owens Street • Buena Park, California 90621 • 714 523-0770

To whom it may concern:

My first encounter with Albert R. Maxwell was on the occasion of his visit to recruit my son into the Army. My son had recently received an appointment to West Point so we merely visited about the service and the opportunities that we both felt it offered as a career, etc.

I was impressed with his appearance, pleasant disposition and his obvious dedication and enthusiasm for the Army and the service.

My second meeting with Al (as I would now call him) occurred when he appeared at my home as a suitor for my daughter Jacqueline. He didn't recall our prior meeting nor having been in my home previous to this. (This absence of memory, or memory blank and his behavior pattern and reactions to social situations was to be a controversial issue in the courtship of my daughter).

After much misunderstanding, and confusion on my daughter's part, she had decided to terminate their dating, stating that she just couldn't understand him. When Al came over that evening I am sure he was aware of her decision to do so. He sat talking to me while she was getting ready to go out, relating a few of his Army experiences and suddenly he completely 'broke down' and cried. All the hell he'd endured for the past four years poured out. He talked non-stop for hours. (I later learned that I was the first and only person he'd ever spoken to concerning these experiences, and incidentally he'd not do so again for some years).

I explained some of these things to Jacqueline and in doing so, clarified some of his 'un-explainable' behavior, rectifying the situation to the extent that it resolved the existing problems.

They were married on October 17, 1946 in Logan, Utah.

I was aware that Al did suffer from headaches and backaches from the outset of our relationship, but was unaware that he was also suffering from recurrent malaria until our daughter so informed us.

It was brought sharply to my attention in May of 1947, while we were vacationing in California, Al was stricken with a particularly virulent attack of malaria losing consciousness and losing a great deal of weight during the attack. He was sent to Madigan General Hospital to receive treatment. (He was stationed at Whidby Island in Washington at the time). He was given a medical discharge from the Army in 1947.

During the first few years these attacks occurred periodically. Rather more frequently at first, but intermittently throughout the years. I was cognizant of these attacks because my wife and I were called upon to assist them or the children during these episodes. Al stubbornly refused to be hospitalized for them, stating that he had the necessary medicine (quinine, I believe) to treat himself. (I felt this to be a mistake on his part and told him so!) The attacks seemed to run the same course, headaches, chills, fever and subsequent weight loss. I couldn't possibly pin point the time on them with the exception of those which occurred invariably after the loss of each of their four children. The week of September 5 through the 12 of 1949, (after the death of our first grandchild Paulette). Jackie told us he'd had another the following May, 1949, again in July of 1951, after the loss of their daughter Michele, on August 8, 1955 following their son Michael's passing, and in August of 1961, upon the loss of their last daughter Rebecca. Several during the years of 1963, 1965, '68, and in 1972.

There were other instances I was told of but didn't personally witness.

Of far more concern to me were the repeated attacks he suffered, which had all of the classic symptoms of a heart attack, pain in the chest wall, numbness and pain in his left arm, etc., which were (and probably still have) not been properly diagnosed.

Our family physician, Dr. Wendall J. Thomson felt, after considerable testing and many examinations, x-rays, etc, that it was 'probably' severe muscle spasms caused by a complete lack of calcium in his system due to his four years of extreme malnutrition. These attacks have increased in severity over the years necessitating hospitalization and treatment in both Ogden hospitals and also at the Veteran's Hospital in Salt Lake City. I was aware of these attacks as we were given the care of our granddaughter Robin, and were living in their home.

These health problems were of considerable distress and caused my son-in-law grievous anxiety because of his loss of work and income.

The loss of our four grandchildren caused us great anguish of mind and spirit (for Al and Jackie as well as for ourselves). The congenital anomalies which claimed the lives of each of these children were incomprehensible to all of us. Family medical histories were examined and -then family genealogy records were researched as to illnesses, causes of death, etc. There were no anomalies, nor malformations. Considering that this is quite a prolific family this information seemed to be significant. Al's family also went through considerable reexamination and evaluation. He is also from a large and healthy family, and there were no abnormalities on his side either.

The consulting specialists kept returning to Al's Army history, where he had been, experiences, etc. When they discovered that he had been in a concentration camp in Nagoya, Japan, when both of the Atomic bombs had been dropped in Hiroshima and Nagasaki, -and had been forced to work in and around the area, they interviewed him in detail. It was their considered opinion that because of his exposure to radiation and the fall-out food and area contamination, etc that there was a 'possible mutation' of the genes, and, that in nine out of ten births, there was a probability of abnormalities. It was something of a miracle that of my daughter's six pregnancies, their fourth daughter Robin was to be born normal. The doctors advised Al and Jackie of this, and told them 'no more children.'

Our family physician had felt from the outset that this was the cause of all of the problems, although he did not voice this opinion until after the specialists arrived at their prognosis. After his initial examination of Al, he told my wife and daughter that "he felt that Al might continue to do fairly well for about ten years or so, but then he would start having problems and would rapidly begin to deteriorate, experiencing all sort of aches and pains. His system has taken far too much punishment externally as well as internally to expect anything else. I can't in all good conscience certify him for a health nor life insurance policy, nor would any other physician do so." (Incidentally Al was turned down for Mortgage and life insurance, which confirmed what our own Doctor had said). Our Doctor's diagnostic prediction has proved to be only too accurate, as Al's subsequent medical history has proven.

It has been apparent over the years that Al distinctly suffered a myriad of 'after-effects' of his imprisonment other than actual - physical pain. His extreme nervousness, and anxiety, his memory loss (spoken of earlier) which comes and goes, caused him untold misery and financial loss. He has always worked on a commission basis, and although we all endeavored to assist him with his memory by keeping note pads, etc., with his clients names and appointments, if he lost his own book, he would 'forget' to call home to ask for the identical information there, and lose his commission. Often he would work with people for weeks and not recall their names--always remembered faces, however.

I noticed a drastic change of personality in Al over the years caused by this constant anxiety and stress over his health, loss of work and of course the trauma of the children's deaths. True to his nature he never openly complained nor even discussed these problems. (I was therefore often unaware of these situations until it was brought my attention by my wife or daughter-as an 'after the fact' occurrence, with the exception of those episodes I have previously noted).

It has been my personal observation that Al's withdrawal and refusal to acknowledge his problems is directly related to his imprisonment, where circumstances dictated that he remain impassive and reticent in order to survive. Consequently he becomes his own worst enemy by 'holding everything in', certainly it only heightened his emotional trauma and could only have contributed to aggravating his ulcer condition.

An insight into his character occurred when in 1959 his pension was reduced. My daughter was truly concerned about this as it was clearly apparent, that far from improving his health was deteriorating. She urged him to appeal this decision, noting that our family Doctor would certainly verify his own rather bleak prognosis of Al's condition. But Al's reaction (typically so, I might add) was that as "long as I'm able to work it's not that important right now, besides they might give that 10% to some other Veteran who needs it worse than I do at present."

In view of his exposure to the Atomic bombs it is really not too surprising that he has subsequently developed cancer (Multiple Myeloma). What is unusual is that so many of the Atomic War Veterans are suffering from the same type of cancer, the significant aspect being that this particular form of cancer is only 1% of all cancer types.

Since I am now living in Arizona I have not seen too much of Al since the diagnosis of his cancer. But he has accepted it with that same stoicism which enabled him to survive during his incarceration.

He is now unable to work because of the acceleration of all of his previous disabilities, which combined with this latest trial, have served to incapacitate him.

It is my considered opinion that you- should certainly review his case giving careful consideration to those early medical diagnoses which forced him from the Army as 'physically unfit' with a medical discharge. (Those Doctors knew what was in store for him or he would not have been so classified (50% disabled) at that time). It is only reasonable to assume that such a condition would continue to accelerate and worsen, as it has.

It is my hope that you gentlemen will award this man the compensation which he needs to exist on. Through his deprivation, incarceration and suffering not only through those almost four years of hell, but his continual struggle with those residuals over the years entitles him to special consideration.

Sincerely,

Leith J. Corbridge
My Commission Expires Mar 23 1985

Leith J. Corbridge

Leith J. Corbridge
 425 North Vineyard
 El Madrid Court Apt. # 5
 Mesa, Arizona. 85201.

On January 9, 1957 I, Robin Maxwell Stepher was born, the fourth of five children, to Albert R. Maxwell and Jacquella Corbridge Maxwell. Of five children, I was the only one born free of congenital b anomalies, the others dying in infancy and early childhood.

There have been several occasions, throughout my life, in which my father's health has been seriously threatened. The incidences have been numerous, however, there are three occasions, that are vivid in my mind, that seem to best characterize the ongoing struggle my father has had with his health.

My earliest recollections of my father's illnesses are when I was around eight years of age. I was told that my father had a form of leukemia and was not expected to live. The trips to the Veterans' Hospital in Salt Lake City were numerous. After some time my father's condition miraculously cleared up and he was able to return home. At a very early age I had faced the possibility of losing one of the most important people in my life. Naturally, my father's health has been of great concern to me ever since.

The Christmas of my 13th year was also filled with hospital visits. This time the visits were to the McKay Dee Hospital in Ogden, Utah. My father was admitted with severe pains in his chest. This chest pain was a common occurrence, which many times my father would choose to try and ignore rather than to seek medical treatment. I could tell by watching my father walk that he was suffering from chest pains. The pain was usually accompanied with extremely high fevers and swelling of the hands and feet. There seemed to be nothing my father could do to ease the pain other than wait until it passed. It was very frustrating and painful for me to have to witness these numerous attacks.

One particular episode that was very frightening to me occurred when I was sixteen years old. We were returning from Ft. Collins, Colorado and had stopped for the night at the Little America Motel in Wyoming. My father had fallen asleep while my mother and I were watching television. We heard some tossing and turning and faint mutterings, and assumed that my father was talking in his sleep. Soon, however, the mutterings turned to anguished screams. Much of what he was screaming was intelligible, and was directly related to the experiences he had as a prisoner of war and during the Bataan Death March. I was terrified and panicked by this attack. My mother reassured me that this would pass. She said that when she and Dad were first married episodes like this happened quite frequently.

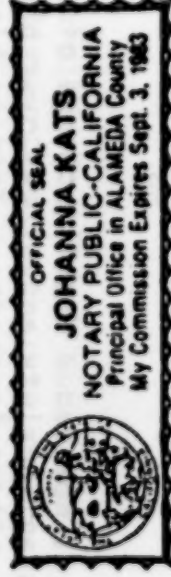
There were many times my father experienced severe back and head pains which were also accompanied with the high fever. These symptoms never seemed to be related to any sort of flu virus, but were just the same symptoms that had been manifested so many times before. These sicknesses have kept my father from reaching many of his career objectives, as much of his time was spent convalescing.

I can't possibly express the love and concern I feel for my father. I feel sorrow for the suffering my father has endured, and regret that his illnesses have kept him from enjoying and participating in many of the things he would have chosen to do. I respect the admirable manner in which he has dealt with his illnesses. I have the upmost concern for both my parents well-being. It is my hope that you will carefully review this case.

Johanna Kats 11-23-1982

Notary

Date



Robin Maxwell Stephens

Robin Maxwell Stephens
3206 Jose Ct.
Hayward, CA. 94542

December 5, 1982

Gentlemen,

Almost a year ago I wrote a letter to the gentlemen of the Veteran's Adjudication Board. It was a hurried, emotional plea for consideration for a claim for my husband Albert R. Maxwell. He was incapacitated and unable to do it for himself and so I undertook the task. The result was a denial. Understandably, upon their parts, because I was so ill-prepared with nothing at my disposal to document his case.

We have spent the ensuing ten months requisitioning medical records, visiting his Army buddies and perusing all of the records so obtained to compile and substantiate with testimonies, depositions and medical opinion an appeal for his claim.

Upon being allowed to read Albert's diary of some thirty five years entries, I was appalled to discover how much of his illness I had been unaware of. Likewise, I was stunned at the dozens of medical examinations and visits to the Veteran's Hospital that I'd not been advised of, and, at the same time seeing diagnosis and notation confirming all of the problems year after year which have beset him. Having said this, I would like to preface my remarks concerning my husband by stating that regardless of what he wrote (in his diary) or said to his Doctors, that, from the first moment of our meeting until the present time, Albert has never complained about his health, his past circumstances, nor his situation in life (with one notable exception, which I will detail later on). It is simply not in his character to do so. The only way I was even able to recognize that problems did exist was through living with him and constant observation. Even then, unless he was physically unable to refrain from expressing pain, much of the time I was unaware the situation existed until it became an aggravated one.

My first impression of Sgt. Albert R. Maxwell was that of a healthy, ruggedly handsome mature man (I assumed him to be about thirty-five years of age). His countenance presented the picture of a completely carefree, happy, sunny dispositioned individual. He exuded supreme self-confidence and possessed the most positive attitude in his approach to life of anyone I'd ever known. I don't know how much of a negative attitude about him, then, or now. He expressed such appreciation for everything, his surroundings, the weather, the scenery, his work, the simplest of meals, in short, everything that society takes for granted. The smallest courtesy was of paramount importance to him. My family and friends dubbed him "the Eternal Optimist." He was a gentleman, chivalrous, in an 'old world' manner with women. He was very direct, candid and frank in his behavior. He completely captivated people with his charm and friendliness. Needless to say I was completely mesmerized by him, even though I was engaged at the time.

His determination to win my love was impressive. I believed that if he applied this same perseverance to everything else, there was literally nothing that he couldn't and wouldn't accomplish in his future life.

I broke my engagement and began dating Al. I was surprised to learn that he was only twenty-five years of age (although looked older than my Father, who was forty one at that time). As our relationship progressed and we began socializing, I discovered aspects of his behaviour that I found inexplicable and intolerable. It was a complete contradiction of the person I'd thought him to be. The candidness I'd found so appealing, was genuine enough, as long as it didn't touch any part of his personal life. About the latter he was completely uncommunicative. He was a complete paradox to me.

I wondered what he was trying to hide from me. He began missing dates and appointments that he himself had made, with no logical explanations, seemingly unconcerned about his forgetfulness. Although he had shown me tenderness, I observed that he displayed great insensitivity towards other's painful incidents. He seemed callous and oblivious to many tragedies around us.

I was completely baffled by him, bewildered and unhappy, in tears most of the time. I knew that he loved me and that he was suffering also, but felt that there was no trust and too much left unexplained between us, to further such a relationship.

As both Albert and my Father have already recounted, there was obviously a logical, albeit heart rending, explanation. When he could finally bring himself to disclose it, the situation resolved itself and we were married.

Again I discovered disparagements. The apparently healthy man I thought I'd married seemed plagued by illnesses. I'd been informed of occasional headaches and maybe an attack of malaria ("maybe" turned out to be 'recurrent' malaria). But I was completely unprepared for his terrifying nightmares. Our nights were filled with his screams, like a soul in torment. The next morning he didn't even recall having them. These episodes would be followed by nights of insomnia and violent headaches, then repeated nightmares again. He had omnipresent aches and pains throughout his body, arms, legs and back, but refused to acknowledge the fact. I knew that he was having real problems, but he seemed to feel that by not recognizing the situation, or ignoring it, it didn't exist, or would resolve itself. Of course it never did, because the underlying cause was never recognized nor treated.

He was informed that he simply had a 'bad case of nerves', the rest of it was all in his head, he should get more rest and not worry so much!

We were told that the malarial attacks would diminish, but they continued regularly, so that he was ill for the next year and a half with these attacks. His eyes were bothering him so much that they required an operation. Shortly thereafter he was given a medical discharge from the Army with a fifty per cent disability.

He was heartbroken with this action as he had wanted to make the Army his career. I believe that part of his unhappiness lay in the fact that he now had to acknowledge what the Army doctors had determined, that he was 'not medically fit'. (He spent the next twenty five years trying to disprove that medical or, becoming a compulsive work-a-holic, giving one-hundred per cent of himself at all times. He never had a Boss who didn't recognize him as their most valued employee acknowledging it with their continuing friendships and support throughout the year.

His health continued in the same manner. After some time I began noticing a 'pattern of sorts'. Whenever there was a stressful situation, the headaches became more pronounced, the insomnia and nightmares accelerated, soon followed by an attack of malaria. These attacks were accompanied by chills, sweats and high fevers that produced delirium. During these interludes I was horrified at some of the disclosures that poured out. All of the incidents he refused to discuss surfaced at this time. Even as a layman, I realized that I was only seeing the "tip of the iceberg."

Conclusively, Al only let us see what he wanted us to see. He had contained and repressed his innermost thoughts, feelings and illnesses, through necessity, throughout his incarceration. He, in effect, turned himself "off" from the world. He'd done it so repeatedly that it had become an integral part of his behavior and character and he couldn't break the pattern he'd established.

It also contributed to another major problem that was, and is, a great source of annoyance, embarrassment and continual distress to him; his memory lapses. This ability to "turn off" probably enabled him to preserve his life, and most certainly saved his sanity, by providing a mental escape from the daily horrors and hell he endured. The doctors explained to us that this process of 'negating everything' was so successful it almost caused a 'total' amnesiac block (not an uncommon occurrence among P.W.'s, tragically, sometimes, leaving them totally mindless). Al's memory lapses were a constant worry to him, causing not only extreme mental agitation and anxiety, but also costing him dearly financially, in lost commissions, because of his inability to remember appointed times and places.

As his medical records document: Repeated attacks of agonizing chest pains, listed as 'unknown etiology', undiagnosed, therefore unpreventable, therefore not treatable.--Swelling of his hands and feet--Allergies, and rashes, (prevalent intermittently since his assignment for 'clean up' detail after the bombings), the latter also termed 'unknown etiology'.--His eyes have continued to atrophy, almost glued shut each morning with a 'pus-like' extraneous matter---His headaches have intensified and his insomnia continuous--Aches and pains in his bones, throughout his body, specifically the back area--Peptic, duodenal ulcer attacks--Notation of an enlargement of his heart, possibly attributable to beri-beri heart disease, because of the damage done to his system by this disease---Lastly, an irreversible form of cancer, Multiple Myeloma. These numerous physical disabilities have increased his anxiety and stress alarmingly. (This has been reiterated by me, because I have personally witnessed all of the above, and have lived with it present throughout our entire married life).

I noted earlier that there was one problem that Al was very vocal about, and that was his sterility. It was the one area that he would seek after medical help when, two years after our marriage, we were blessed with a beautiful baby girl, A reaction was indescribable. The shell, he'd encased himself in, slowly began to open and the person I knew him to be, emerged. I've never seen a father exhibit such adoration over a baby. She became almost the 'sum total' of his existence. He certainly was hers'. Her little face turned to him, as constantly, as a flower to the sun. I was so thrilled to see him so openly displaying his emotions, finally, there appeared the 'vulnerability' that is present in everyone else.

Our joy was short-lived. She was born with a congenital anomaly, an extremely rare heart condition, Tetralogy of Fallot, and, as is usual in these cases, there was also another anomaly, an irregularity of the rectum. Her life expectancy placed at less than a year, with no viable alternative. Medical explanation: "just one of those rare happenings." It couldn't happen again.

We were urged to have another baby. We had a little boy--born with the identical heart anomaly. Because the mathematical odds against such an occurrence were astronomical the medical community in our area evidenced great interest in our case. As has been related we were subjected to intensive medical and historical research in depth, with the doctors particularly intrigued over the part Al's radiation exposure 'may' have played in the babies' anomalies. At that time they were divided in their opinions, and again we were encouraged to have a family. With, unbelievable same results. Congenital anomalies with resulting deaths occurring in four of our five children. (Also, one miscarriage, with a terribly mutated fetus).

I must interject, that, after our family physician had examined Al and treated him at various times, compiled his medical and service history, and after the birth of our second child, he was of the decided opinion that Al's radiation exposure was the decisive factor in the determination of the abnormalities. He correctly diagnosed and predicted the inevitable outcome of our tragedies (although at the time his opinion was in the minority and he was overruled). He also expressed his fear that Al might be a possible victim of cancer (which has since transpired).

Page 4.

When one sustains the loss of a child it produces such anguish of mind and spirit, that the pain is a physical one. Multiply this four times over, coupled with the countless suffering Al had already endured, the cost to his well being was staggering.

Many times in the attempt to deal with such tragedies, people draw completely apart from one another. As Al was accustomed to such withdrawal, I was frantic about him. I needn't have worried. With each succeeding trial we were drawn closer together, and with the miraculous birth of our daughter, Robin, we finally began to experience the joy of a family. Everything we had hoped and prayed for was embodied in this one child, and she has surpassed our every expectation. Beautiful spirit, face, manner and deportment, she has expressed such love and filial devotion that she has over the years assuaged the grief we'd sustained.

All of the vicissitudes and exceptional trials of Al's life have produced a man of sterling character and qualities.

As a father, he was compassionate, loving, understanding and directly involved with the rearing of his children (not just a week end father). Nothing was too trivial in their lives to go unnoticed by him. He adored them, and was worshipped in return. He was literally a "Pied Piper" with our own, and everyone else's children.

As a man, I respect and admire him as no other person in this world. He is always my best friend.

He has been the tenderest, most loving, attentive and considerate of husbands supportive of me in my every endeavor, protective, to the point of always hiding all unpleasantness from me (as has been noted). In spite of all of our difficulties he's surrounded me with such an aura of love and security, he has made me feel a queen among women. I feel blessed to have been chosen by such a man to share his life with him. After thirty five years he is still my 'knight in shining armor,' and I will love him as long as the Lord allows me time to do so.

I respectfully request that you grant him the compensation that is due him, in order that he might have a dignity and quality of life in the time remaining to him.

Thanking you for your time and consideration, I am,

Sincerely,

Jacqueline C. Maxwell

(Mrs. Albert R. Maxwell).

Regional Office

125 South State Street
Salt Lake City, Utah 84138Veterans
Administration

524/5-763

In Reply Refer To:
341/21
C 9 594 221Albert R. Maxwell
704 Eastside Drive
Layton, UT 84041

Dear Mr. Maxwell:

Pursuant to your request, a personal hearing has been scheduled for you on the date and at the time shown below at the Veterans Administration Regional Office on the fifth floor of the Federal Building, 125 South State Street, Salt Lake City, Utah.

Day: Wednesday

Date: March 17, 1982

Time: 10:00

Our records indicate you have appointed the Disabled American Veterans as your personal representative. Please contact your representative in Room 5239 prior to the time the hearing is scheduled. He will notify the Veterans Administration of your appearance.

The Veterans Administration has no authority to pay any expenses incident to this hearing. Therefore, any expenses in reporting must be paid by you. You must make your own arrangements for any witness you desire to testify.

In the event you are unable to appear at the time specified, please notify this office in writing prior to the scheduled hearing.

There are several two hour parking spaces reserved on the Federal Building grounds against the south wall as you enter through the gate off the State Street entrance. This is for the convenience of visitors. You are cautioned, however, to abide by all signs in the areas as some spaces are reserved for other agencies.

Sincerely yours,

Wm. F. X. McCONNELL
Adjudication Officer

Enclosure: VA Form 1-4297

cc:
Disabled American Veterans

Veterans Administration
Regional Office
Federal Office
125 South State Street
Salt Lake City, Utah 84111

Regarding a claim for disability
for
Albert R. Maxwell

December 11, 1981

Gentlemen:

Upon his re-admission to the Veterans Hospital, my husband, Albert R. Maxwell's claim for increased disability comes before you for consideration.

This time I would like you to have a few more pertinent and personal facts and data with which to review this claim.

In times (and years) past he has been admitted and re-admitted to the hospital for basically the same reason--symptoms of agonizing pain throughout his body. He has been examined each and every time with complete 'work-ups' of X-rays, blood tests, upper and lower G.I. series, EKG's, liver, spleen, and kidney tests, urine analysis, etc, etc with the same inconclusive results

The doctors review his voluminous medical file, his past medical history documenting extreme malnutrition (Japanese P.O.W. for 4 years), residuals of Beri-Beri, Dhenghi fever amoebic dysentery, Palegra, blinding headaches (shrapnel wounds in his eyes, scar tissue removal--22'70 vision) and lastly Malaria, and arrive at the 'probable' explanation that it is undoubtedly some sort of amoebic parasitic bug that some of the G.I.'s picked up in the South Sea Islands, that it lodges in the intestinal walls, lays dormant for years then suddenly it re-activates causing debilitating pains and illness to follow.

They have arrived at this conclusion because these same symptoms started happening to the G.I.'s with much the same medical history and geographic military history as Albert's. This disease appeared from twenty-five to thirty years later in some of these men. So the even after thirty-five years it is still uncategorized.

I would like to say a few words about the Malaria which has attacked his body over and over again. I along with many other 'laymen' assumed that eventually this illness would subside and in effect 'go away' in time. But of course that has not happened, oh, maybe for a couple of years or so and then any sort of weakness or mental trauma seemed to 'trigger' it off with devastating effects. His fevers would run so high they wouldn't register on the thermometer, and caused delirium that lasted for hours, and resulting in a twenty-five pound weight loss over a three day period of chills and sweating, leaving him with blinding headaches.

(Many times the 'mental trauma' I've spoken of was caused by the deaths of one of the four children we've lost (due to congenital disorders which many of his doctors have felt was caused by his possible exposure to the effects of the H-bomb which was dropped near his prison camp in Japan).

He stopped entering the hospital each time the Malaria occurred because we knew that it would run its course and he would be back on his feet. In the interim, because he is, and always has been self-employed, our income would cease and we would spend the next couple of months 'catching up' with our financial obligations. Over the years all of the various illnesses have almost completely 'swallowed up' all of our savings.

He has always been so stoic, self-effacing and patient in his acceptance of these 'bout as something to be expected and endured without complaining about them. But the periods of pain and non-productivity have increased over the years without these important facts ever having been brought before you simply because he didn't want to complain!

As a result all of this information has never been brought to your attention and as a consequence his claim has never been strengthened or increased.

(re- Albert R. Maxwell) Page 2.

During the past year and a half he has not been able to work more ^{than} four months, and the not consecutively. He has been suffering from pain (extreme pain) in his lower back and shoulder for which he has been receiving treatment for a possible 'arthritis' condition, which since his admission to the hospital has been positively and correctly diagnosed as Multiple Myeloma (cancer of the marrow of the bone) a Lukemia of the bone.

He has been advised by the doctors that because of the pain and the treatment thereof, radiation and chemotherapy, etc, he may be unable to work indefinitely, and indeed may be totally disabled.

Therefore because of this latest deterioration in his condition coupled with his prior medical history, all service connected and directly attributable to his imprisonment and incarceration and deprivation as a P.O.W. we respectfully submit this claim to you and implore you to grant him the Maximum amount that he might have some 'quality of life' in the remaining time he may have left to him. The doctors have told us that even with effective treatment he may expect his life span to be shortened by five to ten years, as he is now 60 years old this doesn't leave him with much expectation.

It is one thing to type this data so that you may have a written report before you, but you can only imagine the heartache and anguish that all of this has brought into our lives.

I wish to thank you for your consideration of his claim, and for the service you perform for him and veterans everywhere.

I also wish to commend the Veterans Hospital for the wonderful care and treatment accorded to my husband over these thirty five years. There has never been a time that he hasn't received the finest attention.

I also wish to thank all of the dedicated physicians attached to the hospital, in particular to Dr. Romney who has treated my husband all of these years.. and to Dr. Jense in outpatient clinic for his prompt action in helping to correctly diagnose this last tragic disease.

Very Sincerely,

Jaqueline E. Maxwell

on behalf of my husband Albert R. Maxwell.

A. R. Maxwell
704 Eastside Drive
Layton Utah, 84041

Regional Office

125 South State Street
Salt Lake City, Utah 84138Albert R. Maxwell
704 Eastside Drive
Layton, UT 84041In Reply Refer To: 341/212
C 09 594 221

Dear Mr. Maxwell:

Careful consideration has been given to the current evaluation of your service-connected disabilities and your request that service connection be established for multiple myelomas, a degenerative joint disease, and a peptic ulcer. We have reviewed all the evidence of record, including all military records and the report of your most recent treatment at the VA Medical Center, Salt Lake City, Utah, for the period November 9, 1981, to December 12, 1981.

The medical evidence of record would not support a grant of service connection for the disabilities of multiple myelomas, a degenerative joint disease, or a peptic ulcer. An increase in the evaluation of your disabilities already established as service connected is not warranted.

We note that you would like a personal hearing at this Regional Office to present additional information or evidence in conjunction with your claim. Your request has been referred to our Rating Board, so they may make the necessary arrangements for such a hearing. You will be receiving additional instructions concerning this hearing, in the near future.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'Wm. F. X. McConnell'.
Wm. F. X. McCONNELL
Adjudication OfficerEnclosure:
VA Form 1-4107cc:
Disabled American Veterans

(82

NATIONAL SERVICE OFFICER
GEORGE L. CAREY

NATIONAL SERVICE DEPT.
1781 18th St. N.W., Washington 5, D.C.



NATIONAL SERVICE OFFICE
VA Regional Office
1750 S. Redwood Rd.
Salt Lake City 4, Utah

March 30, 1959

Mr. Albert R. Maxwell
P. O. Box 543
Ogden, Utah

C 9 594 221

Dear Mr. Maxwell:

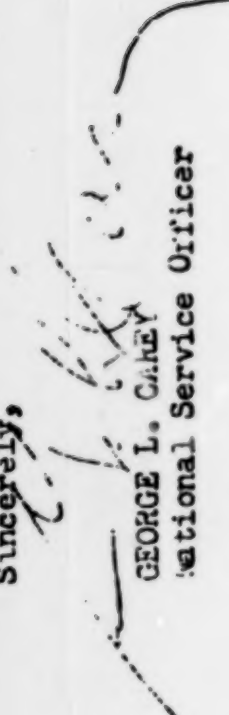
Your case came through the Rating Board today, and based on the examination which was given you your compensation has been reduced from 50% to 40%. The conditions that were considered improved were the scars on your leg and the vision of your eyes. Both of these were rated at 40% each, and in order to maintain a 50% rating we will have to show that both of these are still at least 10% disabling.

Whether this can be done I don't know. You are still rated at 30% for the residuals of beriberi, and at 10% for conjunctivitis. In the event you feel these other conditions should not have been reduced we will require medical evidence to rebutt the findings of the VA doctor.

Enclosed for the assistance of your doctor is one of our Physician's Affidavit forms which need not be notarized. The only conditions we are interested in right now is that of your eyes and the scar on your leg.

I can take no action until I receive this needed evidence from you.

Sincerely,



GEORGE L. CAREY
National Service Officer

GLC:kt
Enclosure

Veterans Adjudication Board
Veterans Administration

Re: Albert R. Maxwell
V.A. Compensation Claim

December 5, 1982

Gentlemen:

I had a personal hearing scheduled with the Veterans Adjudication Board on March 17, 1982 to appeal the denial of my claim for increased compensation.

I contacted my representative with the D.A.V., Mr. George Carey and requested that he postpone the meeting and file a Notice of Disagreement, as I needed additional time for the preparation of my case. (I had been hospitalized almost continuously for two months and unable to do the required research).

I assumed that Mr. Carey had done what he agreed to do. I waited for over six-months only to discover that he had retired. I further discovered that instead of filing the Notice of Disagreement, he had simply canceled my Personal Hearing, and done nothing else regarding my case.

I was never notified as to the status of my case.


I understand that my case is retroactive to March 17, 1982, and am filing my appeal at this time for total disability.

Sincerely

Albert R. Maxwell

Albert R. Maxwell

EXHIBIT C

VETERANS ADMINISTRATION		SOCIAL SECURITY NO. 520-10-1098	VA FILE NO. C- 20949094
STATEMENT IN SUPPORT OF CLAIM			
<small>PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C&I)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.</small>			
<small>FIRST NAME-MIDDLE NAME-LAST NAME OF VETERAN (Type or print)</small> Albert R. Maxwell			
The following statement is made in connection with a claim for benefits in the case of the above-named veteran:			
I wish to file my claim for a compensation increase under the former prisoner of war act of 1981 and public law 97-37, for the ailments listed below that have been shown to be prevalent among ex-pow's and to be caused by malnutrition and stress. I am filing for total disability based upon the following ailments: (listed (are prescribed Rx's for the treatment of same):			
1- Intestinal problems (Peptic ulcer, Duodenal ulcer, excessive gastritis, and many periods of Diarrhea and constipation) (Rx's Cimetidine, Tagamet, Simethicone, Magnesium Citrate).			
2- Muscle spasms, Charley horses in feet, hands, calves, thighs, chest and back. (Rx's Butazolidin Alka and Clinoril).			
3- Chronic headaches and insomnia. (Rx's Flurazepan).			
4- Optic Atrophy and diminishing eyesight (phlegm on eyelids every morning). (Rx's Sulfacetamide 10% op. Sol.). Eyes were operated on in 1947.			
5- Edema (Berl-beri) in hands, feet, calves, and stomach. (Lasix and Potassium Chloride).			
6- Arthritis in lower back and shoulders. (Rx's Ibuprofen, Tylox and Motrin).			
7- Extreme rashes, itching and swellings. (Rx Hydroxyzine).			
8- Anxiety neuroses, (nightmares, irritability, nervousness, sweats over upper body and Anti-social behavior). (Rx's Vallium and Flurazepan			
9- Hayfever and Sinus problems (Rx's Actifed, Dinetapp and Drixoral).			
10-Malaria (Rx's Quinine and Atabrine).			
11-Multiple Myeloma (Rx- Radiation Therapy, Rx's Cytosin and Prepnisone and Tylox			
The therapy treatment consists of Chemotherapy every three weeks for four days. Because this disease manifests itself in spontaneous fractures through any undue strain or inadvertent action, it has made it virtually impossible for me			
<small>CONTINUE ON REVERSE</small>			
I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.			
DATE SIGNED	SIGNATURE		
12-2-82			
ADDRESS	3206 Jose Court Hayward, Calif. 94512		
<small>PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.</small>			

to work even part time.

12- Varicose Veins (necessitating vein ligation on left leg in 1958).

All of the above ailments have been an integral part of my life over the past years and can be directly attributed to my forty-two months as a Japanese P.O.W.

The statement of the Former Prisoner of War Act of 1981 and Public Law 97-37 I believe entitles me to be upgraded to total disability (instead of the 40% that I now have).

At the time of my discharge from the Army I was granted a 50% disability and my health has continually deteriorated to the point of 100% disability at the present time.

All of the above statements (physical disabilities) are corroborated by Medical documentation, depositions and notarized testimonies contained herein.

VETERANS ADMINISTRATION		SOCIAL SECURITY NO.	VA FILE NO.
STATEMENT IN SUPPORT OF CLAIM		520 10 1098	C-9 594221
<small>PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (CXI)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.</small>			
FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)			
ALBERT MAXWELL			
The following statement is made in connection with a claim for benefits in the case of the above-named veteran:			
I HAVE A PENDING CLAIM TO ESTABLISH SERVICE CONNECTION FOR VARIOUS DISABILITIES ASSOCIATED WITH MY PREVIOUS JAPANESE PRISONER OF WAR EXPERIENCE AND EXPOSURE TO LOW LEVEL RADIATION. THESE WERE PREVIOUSLY CONTAINED.			
I WAS SCHEDULED FOR A PERSONAL HEARING AT THE VA REGIONAL OFFICE SALT LAKE CITY, UTAH 3-17-1982. I REQUESTED TO HAVE THIS HEARING DELAYED SO THAT I COULD DEVELOP MY CASE FURTHER.			
MY CLAIM MAY HAVE BEEN INADVERTENTLY DELAYED BY IMPROPER ACTION TAKEN BY THE DAN MY STATEMENT OF 12/2/1982 WAS WITH THE INTENT TO CONTINUE MY APPEAL. THE VA CLAIMS TELETYPE SHOULD BE OBTAINED FROM SALT LAKE CITY VA REGIONAL OFFICE AND ROUTED TO THE DAN SERVICE OFFICE IN SAN FRANCISCO FOR FURTHER REVIEW.			
(CONTINUE ON REVERSE)			
I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.			
DATE SIGNED	SIGNATURE		
1/4/1983	Albert R. Maxwell		
ADDRESS	3206 JOSE COURT HAYWARD CALIFORNIA 94542		
PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.			

issues

1. Severe connection for

- a) gastro intestinal
- b) hemorrhoids
- c) Post traumatic arthritis R Shoulder, lumbar
- d) Post traumatic stress
- e) Multiple myeloma. distal radioulnar joint
- f) Pain Right Quadrant

Dept. Veteran benefit Circular 9-27-1982
21-81-9

Page 1 First line 2 with may be considered
insured shall be considered

San Francisco

4150 Clement St - 221-4810

Reedy

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GOLDEN GATE

19th St 3rd

Clement



Veterans
Administration

JUN 22 1982

AL:



Mr. Reason F. Warehime, Jr.
P. O. Box 398
Riverdale, CA 93656

Dear Mr. Warehime:

We are writing you concerning your appeal which is in the Board for consideration.

At this time, we would like to clarify your representation. We note that you appointed the Disabled American Veterans as your accredited representative in September 1976. However, Attorney Robert T. Durbrow, Jr., has been assisting you in the prosecution of your claim. Veterans Administration Regulations provide that only one service organization, individual attorney or agent will be recognized at any one time in the prosecution of a claim for one specific benefit. We also note on your Substantive Appeal dated May 9, 1981, you indicate you do not desire representation.

If you desire to appoint Attorney Durbrow or another attorney as your representative, he should submit a statement certifying that he is representing you during the prosecution of a claim. This statement can be in letter form over his signature. You should submit a statement designating whether the attorney will represent you in all matters, or whether representation is limited to your current appeal. For your information, the maximum attorney fee under the law (38 U.S.C. 3404) is \$10.

If you wish to designate an agent to represent you, the enclosed VA Form 2-22a should be completed and returned to this Board. This form may also be used to appoint an attorney.

Various accredited service organizations provide free representation on request. If you wish to appoint a service organization other than the Disabled American Veterans to represent you, the enclosed VA Form 23-22 should be completed and returned to this Board. On the back of the form is a list of recognized service organizations. For your convenience, I have checked those with representation at the Board of Veterans Appeals.

We are deferring our study for 20 days pending receipt of your reply. If we do not hear from you within this time, we will assume that you desire to retain the Disabled American Veterans as your accredited representative. Thereafter, your appeal will be returned to its regular order.

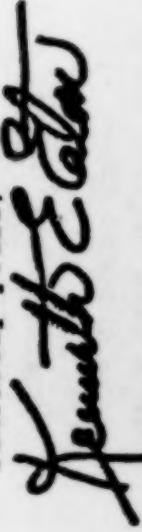
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WAREHIME, Reason F. , Jr.

C 13 005 384

of consideration. You will be notified of our determination as soon as it is entered.

Sincerely yours,



KENNETH E. EATON
Acting Chairman

Encl. 2

VA Form 23-22

VA Form 2-22a

2CC: Honorable Alan Cranston

2CC: Honorable Tony Coelho

CC: DAV, Washington, DC

CC: DAV, VARO, San Francisco, CA

CC: Mr. Robert T. Durbrow, Jr.
Attorney at Law

Mr. Robert T. Durbrow, Jr.
Attorney at Law
4270 North Blackstone, Suite #216
Fresno, California 93726

Dear Mr. Durbrow:

Your recent letter indicates that you are authorized to represent your client in the prosecution of Mr. Warehime's claim for service-connection before the Veterans Administration.

There is an outstanding power of attorney executed by your client in favor of the Disabled American Veterans. The current power of attorney must remain in effect until we have received a statement, signed by your client, showing the nature and extent your representative capacity. This statement should also state whether the prior power of attorney is to remain in effect or be revoked.

Pending receipt of the statement, we will furnish you, for a reasonable period, carbon copies of correspondence from this office to your client relating to the pending claim.

Laws, regulations and procedures relating to veterans benefits are codified in Title 38, Code of Federal Regulations. Sections 14.629 through 14.365 set forth provisions relating specifically to agents. Your attention is invited to particular to Section 14.634.

We welcome the opportunity of cooperating with you in the interests of your client.

Sincerely yours,

T. A. VERRILL
Adjudication Officer

cc:
Disabled American Veterans
Reason F. Warehime

343/215A C-13 005 384 WAREHIME, Reason F.

EXHIBIT G

Regional Office

211 Main Street
San Francisco, CA 94105Veterans
Administration

Mr. Reasons Warehime, Jr.
P. O. Box 398
Riverdale, CA 93656

Dear Mr. Warehime:

We have your substantive appeal wherein you indicated you wanted a personal hearing.

You are, of course, entitled to a personal hearing. It is, however, our responsibility to advise you of certain facts. First, due to the backlog of scheduled hearings, it would be most likely several months before a personal hearing could be held, and with the time allowed for typing the transcript of the hearing, it could result in a substantial delay in submission of your appeal to the Board of Veterans Appeals in Washington, D.C. Secondly, a personal hearing in the Veterans Administration Regional Office, San Francisco, would be before the local rating board which has evaluated your case previously, not the Board of Veterans Appeals personnel. Thirdly, certified statements carry as much weight as in-person testimony. Fourthly, if you do not have new and material evidence, preferably medical, but would be merely restating previously furnished information, no change could be made based on the personal hearing alone.

If you still wish to have a personal hearing, please advise us within 30 days, and we will be happy to schedule one for you. If we do not hear from you, we will assume you wish your appeal to be certified to the Board of Veterans Appeals without further delay for a hearing.

Sincerely yours,

T. A. VERRILL
Adjudication Officer

cc:

Disabled American Veterans
343/215 C-13 005 384

in Reply Refer To:

EXHIBIT H

Regional Office

211 Main Street
San Francisco, CA 94108Veterans
Administration

May 5, 1982

Mrs. Doris J. Wilson
4833 Boyd Drive
Carmichael, CA 95608



Dear Mrs. Wilson:

With respect to your request for a hearing, we have selected a tentative date and time of Wednesday, June 2, 1982, at 1:30 p.m. Hearings are conducted at this address on the 12th floor, Hearing Room A. Personal expenses incidental to hearings must be met by appellants.

In a few days we will contact you to confirm the hearing date. In the meantime, you should consider several points regarding hearings. Our hearings are nonadversary. That means that they are informal and serve the purpose of receiving testimony pertinent to the issue. We do not contend with appellants by arguing our point of view and we do not conduct cross-examinations. See the attached form for more information on the nature of hearings.

There are a few common misconceptions regarding hearings. For example, appellants assume that the hearing is a necessary step in the appeal process. This is not true. You may proceed with an appeal to the Board of Veterans Appeals, Washington, D. C., even though no hearing transpired. Also, appellants assume that the hearing is conducted by persons at a higher administrative level than those who made the original decision. Actually, the hearing is conducted by persons in the same positions as those who made the decision.

We offer these observations to enable you to make an informed decision on the question of proceeding with the hearing. You may wish to contact your service representative, Veterans of Foreign Wars, Room 1209, for further information, or you may hold your questions in anticipation of our contact. Of course, you may decide at any point that your evidence can be presented equally well in writing. If you so decide, please use the enclosed statement(s) in support of claim.

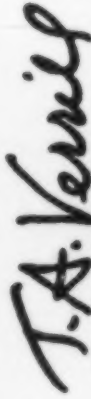
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XC-14 992 808

Mrs. Doris J. Wilson

Also, you requested a 90-day extension. The 60-days mentioned in our February 22 letter is for administrative purposes. You actually have until January 21, 1983, to complete your appeal. You may present your evidence at your hearing or as soon after it as you can.

Sincerely yours,



T. A. VERRILL
Adjudication Officer

Enclosures:

VA Form 21-4138
VA Form 1-4297

cc:

Veterans of Foreign Wars

VETERANS ADMINISTRATION

Fed Bldg., Fort Snelling
St. Paul MN 55111

74

May 19, 1981

IN REPLY REFER TO 21-24

FILE NUMBER

Your claim for death benefits is disallowed.

The evidence does not establish that the veteran's death was due to a service-connected disability.

THANK YOU.
VETERANS ADMINISTRATION

IMPORTANT-SEE REVERSE FOR PROCEDURAL AND APPELLATE RIGHTS
KEEP THIS LETTER FOR FUTURE REFERENCE

EXHIBIT K

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

We have based our decision on the evidence of record in your case and the applicable law. This explains your procedural and appellate rights in connection with this decision.

REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization recognized by the Administrator of Veterans Affairs, or you may employ an attorney to assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services. The services of a recognized attorney are subject to a maximum fee limitation of \$10, set forth in 38 U.S.C. 3404(c). If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action on your part is required.

NEW EVIDENCE. You may submit additional evidence to strengthen your claim. It is in your interest to send us any new evidence as promptly as possible. We will carefully consider it and let you know whether it changes our decision.

PERSONAL HEARING. If you desire a personal hearing to present evidence or argument on any point of importance in your claim, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in record. The VA will furnish the hearing room, provide hearing officials, and prepare the transcript of the proceedings. The VA cannot pay any other expenses of the hearing, since a personal hearing is not required.

APPEAL. You may appeal our decision to the Board of Veterans Appeals at any time within one year from the date of this letter if you believe the decision is not in accord with the law and the facts now of record. You can start the appeal process by filing a Notice of Disagreement. You may do this by writing a letter to this office stating that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. If you decide to appeal, we will advise you further as to your procedural rights as your claim progresses through the several stages of the appeal process.

**MEMORANDUM DECISION AND ORDER
(CAPTION OMITTED)**

I. INTRODUCTION

Plaintiffs challenge the constitutionality of 38 U.S.C. §§ 3404-3405, which impose a flat \$10.00 fee limit for all work performed by an attorney in representing a veteran pursuing a claim before the Veterans Administration ("VA") for service-connected death and disability compensation. Plaintiff National Association of Radiation Survivors ("NARS") is an organization of veterans whose purpose is to obtain health care, compensation, and other benefits for its members and their families. Its members are veterans who participated in atomic bomb tests. Many of its members have pending Service-Connected Death and Disability Claims ("SCDDC"), 38 U.S.C. § 301 *et. seq.*, before the VA. Plaintiff Swords to Plowshares Veterans Rights Organization ("Swords to Plowshares") is a veterans organization emphasizing Vietnam veterans. Some of its staff and many of its clients are recipients or applicants for SCDDC benefits.

In addition to the organizational plaintiffs, there are several individual plaintiffs. Plaintiff Don Cordray allegedly contracted cancer and other ailments from exposure to radiation during atomic testing while on duty in the Navy, but was denied compensation by the VA. He alleges that he wanted to retain an attorney to represent him in his claim before the VA, but was prevented by the \$10.00 fee limitation. Plaintiff Maxwell alleges that as a prisoner of war during World War II he was exposed to radiation from the Hiroshima and Nagasaki bombs, causing him to contract cancer and other disorders and causing four of his five babies to die of rare congenital abnormalities. His claims for radiation-related ailments were denied. He contacted an attorney to represent him but the attorney declined because of the \$10.00 fee limitation. Plaintiff Warehime was part of a clean-up detail to Nagasaki and present at an atomic test which he alleges caused a variety of ailments. When he was downrated from a 100% to a 60% percent disability rating

by the VA,¹ he contacted several attorneys to challenge his downrating, but was unable to obtain representation because of the \$10.00 limit.

Plaintiff Doris Wilson is the widow of a veteran whose ship was allegedly contaminated by radiation and who subsequently died of cancer. Ms. Wilson attempted to hire an attorney to represent her in her husband's claim for SCDDC but failed due to the \$10.00 limit. The claim was denied.

Defendants are the VA, its Administrator, Walters, and its San Francisco Regional Director, Ising.

Plaintiffs challenge the \$10.00 fee limitation embodied in §§ 3404-3405 as a deprivation of their right to procedural due process under the Fifth Amendment to the United States Constitution and their rights to petition and to speak and associate freely under the First Amendment. Section 3404 limits fees for attorneys and claims agents to \$10.00 per successful claim:

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed \$10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed.

Section 3405 provides that any fee charged other than the \$10.00 fee provided for successful claims in § 3404 subjects attorneys to a \$500.00 fine or two years in prison:

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title,

¹ The VA rates disability on a percentage scale of partial to total disability, in contrast to Social Security Disability which makes no provision for partial disability.

... shall be fined not more than \$500 or imprisoned at hard labor for not more than two years, or both.

Plaintiffs allege that the \$10.00 limit effectively deprives them of the ability to obtain counsel to represent them before the VA, because attorneys refuse to work for such a low fee and free legal assistance is not available in sufficient quantity. They further allege that a variety of factors combine to make the ability to retain counsel essential to a fair hearing on their disability claims, consistent with their right to due process. They allege that the recent emergence of new types of claims such as the individual plaintiffs' claim of radiation-caused illnesses, as well as claims of illnesses caused by exposure to the toxic chemical defoliant known as "Agent Orange" and Post Traumatic Stress Syndrome, has introduced new and greater complexity into the proof required. Therefore, they argue, legal representation is necessary for proper investigation and presentation of VA claims. They further allege that VA proceedings, while putatively non-adversarial, are in fact adversarial in nature, and that VA staff do not assist claimants in developing their claims. To the contrary, plaintiffs charge that VA staff encourage claimants to waive procedural rights. They allege that VA procedures are labyrinthine, frequently contained only in unpublished form, and difficult for the initiated veteran to penetrate. They also charge that the statutorily permissible free representation provided by lay service organizations, such as the American Legion and The Veterans of Foreign Wars, 38 U.S.C. 3402, is inadequate due to insufficient resources and training to handle complex claims. In addition, plaintiffs allege that many veterans are poor and must depend totally or primarily on SCDDC for their support. Finally, they point to the lack of judicial review of VA claims decisions. 38 U.S.C. § 211(a). These circumstances, they argue, combine to make the option of representation by counsel a requirement of due process. In addition, plaintiffs claim that the effective ban on their ability to retain counsel deprives them of their First Amendment rights to petition the government for redress of grievances and to speak and associate freely

for purposes of obtaining compensation for their service-connected illnesses and deaths.

Defendants move to dismiss plaintiffs' procedural due process claim on the ground that the Supreme Court has already upheld the constitutionality of the fee limitation, most recently in its summary affirmance of *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975), *aff'd per curiam sub nom. Gendron v. Levi*, 423 U.S. 802 (1976). Defendants also move to dismiss the First Amendment claim on the grounds that plaintiffs' rights to petition, speech, and association and to meaningful access to the VA do not include the right to representation by an attorney.

Defendants rely primarily on legal argument, although they do introduce a few factual claims into their motion papers. Plaintiffs respond by treating defendants' motion as one for summary judgment and submit extensive exhibits in addition to their legal argument. The court concludes, however, that this motion is properly resolved on legal grounds alone, and that consideration of factual support for plaintiffs' allegations is premature. Accordingly, the court has not considered the factual material presented by either party, treating this motion as one to dismiss. The court has assumed all factual allegations in the complaint to be true and considered only whether plaintiffs have stated a claim.

Having reviewed the papers and heard the arguments of counsel, the court concludes that the motion to dismiss must be denied.

II. PLAINTIFFS' CLAIM THAT THE \$10.00 FEE LIMITATION VIOLATES THEIR RIGHT TO PROCEDURAL DUE PROCESS

Plaintiffs base their due process claim on the landmark case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), and its progeny. *Goldberg* held that welfare recipients have a property interest in welfare benefits and therefore are entitled to certain procedural protections before termination of their benefits. The Court rejected the rights/privileges distinction, holding that statutory entitlement to benefits establishes a property interest. *Id.* at 262. The Court held that due process requires that welfare recipients receive a pretermination hearing with notice and an opportunity to

be heard and to cross-examine witnesses and, most importantly for this case, the right to be represented by retained counsel. The Court observed:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.

397 U.S. at 270-71 (emphasis added).

Subsequent Supreme Court decisions have made clear that analysis of procedural due process claims proceeds in two stages. First, the court must decide whether plaintiff has a liberty or property interest in the benefits sought which is protected under the Due Process Clause. Second, if plaintiff has the requisite liberty or property interest, the court must then decide what process is due. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); *Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980). The test for determining what process is due is a flexible balancing test that takes into account all the particular facts and circumstances:

"[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230] (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 [92 S.Ct. 2593, 2600, 33 L.Ed.2d 484] (1972). . . . [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of addi-

tional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., *Goldberg v. Kelly*, *supra*, 397 U.S., at 263-271 [90 S.Ct. at 1018-1022].

424 U.S. at 334-35.

Although the Supreme Court has never expressly held that applicants for government benefits, as distinct from recipients threatened with termination, have a property interest in those benefits protected under the Due Process Clause, the Ninth Circuit and many other lower courts have so held. See, e.g., *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for subsidized housing have a property interest because applicants are members of the class the subsidy was intended to benefit and their eligibility is determined under standards that limit the decision-maker's discretion); *Griffeth v. Detrich*, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied sub nom. Peer v. Griffeth*, 445 U.S. 970 (1980) (applicants for general relief have property interest because authorizing statute and implementing regulations create "a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements," *id.* at 121, and benefits are not discretionary); *Kelly v. Railway Retirement Board*, 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity under Railway Retirement Act had property interest; due process attaches to determination of eligibility at both application and termination stages); *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (applicants initially denied social security benefits, like those facing terminations, may be entitled to due process); *Davis v. United States*, 415 F. Supp. 1086, 1090-92, 1095-96 (D. Kan. 1976) (applicant for compensation for injuries incurred while engaged in prison employment has property interest in compensation for injuries which may severely restrict or eliminate his earnings capacity); *Shaw v. Weinberger*, 395 F. Supp. 268, 270-71 (W.D.N.C. 1975) (Supplemental Security Income applicant has property interest); *Barnett v. Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (welfare ap-

plicant has property interest); see *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (applicant for admission to practice law entitled to due process).

These courts reasoned that applicants, just like recipients threatened with termination for alleged ineligibility, have a property interest because of their statutory entitlement to benefits if they meet the substantive requirements. For example, the court in *Davis v. United States*, 415 F. Supp. 1086, provided a careful analysis of the property interest of an applicant for compensation benefits for injuries allegedly suffered while employed in a federal prison hospital:

[T]he applicant's interest consists of a claim authorized by statute and regulations to secure compensation for alleged *employment disabilities of prison origin that may severely restrict, and sometimes eradicate, his earning potential upon release into society*. Although at the application stage of the proceedings neither plaintiff nor a claimant in his position has yet been administratively adjudged entitled to receive benefits under the regulatory scheme, *an applicant nonetheless possesses a property interest of sufficient magnitude to invoke the protection of the Fifth Amendment's due process clause*. Like the welfare plaintiffs in *Goldberg v. Kelly*, 397 U.S. 254 [90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)], inmates have been granted an *entitlement to compensation benefits* under 18 U.S.C. § 4126 and its attendant regulations if they factually satisfy the criteria set forth by the regulations. By their establishment of an objective medical standard for qualification, the regulations create a *legitimate expectancy* that an individual application will not be denied *unless the Bureau factually determines either that the claimant does not suffer from a disability originating from his prison employment, or from one that would affect his work capacity after release...* This property interest is one of substantial importance to the plaintiff, *as its arbitrary denial could leave him with an uncompensated disability of lifelong duration and condemn him to "suffer grievous loss."*

Id. at 1090-91 (emphasis added). The analysis of these cases establishing a property interest in applicants for benefits applies equally in this case.

That interpretation is consistent with the Supreme Court's analysis of *Goldberg* in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

the welfare recipients in *Goldberg v. Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

As the Davis court observed:

This statement demonstrates that the focal point of *Goldberg* was not upon the fact that benefits have previously been received, but upon the existence of statutory provisions creating the right to welfare and defining the terms under which it could be obtained.

Davis v. United States, 415 F. Supp. at 1092. It is true that a property interest in a benefit must be grounded in "a legitimate claim of entitlement" which is "more than an abstract need or desire for it" or "a unilateral expectation of it." *Roth*, 408 U.S. at 577. However, the plaintiffs here have the requisite legitimate claim of entitlement by virtue of the statutory entitlement to veterans benefits and their successful completion of military service. If they meet the requirements for service-connected death and disability, they are entitled to benefits. This is in sharp contrast to the plaintiff in *Roth*, who had no right to renewal of his teaching position under state law or past practice even if he performed satisfactorily. *Id.* at 567.

Defendants argue that *Arnett v. Kennedy*, 416 U.S. 134 (1974), limited *Goldberg* by adopting the view that substantive statutory entitlements are limited by the accompanying procedural mechanisms for their implementation. That was the view of three judges, at least as to federal government employees terminable at will. Six judges rejected that position, however, holding that such employees

had a substantive property interest separate from the procedural mechanism for termination.

The second stage of the analysis, determining whether the \$10.00 limit on attorneys' fees accords with due process, requires a careful inquiry into all the relevant circumstances to determine what process is due in the particular situation. See *Mathews v. Eldridge*, 424 U.S. at 334. The court must weigh the interests of the plaintiff veterans in obtaining service-connected death and disability benefits, the risk of erroneous deprivation created by the \$10.00 fee limit, the probable value, if any, of increased access to retained counsel, and the government's interest in maintaining the limit. 424 U.S. at 335. Plaintiffs have alleged sufficient facts showing that the balance tips against the \$10.00 limit to survive a motion to dismiss.

The veterans' interest in compensation, which in some instances may be less than that of welfare applicants for whom welfare benefits represent the last recourse against brutal need, appears to be as great or greater than that of others held entitled to procedural protections, such as applicants for subsidized housing, *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982), and veterans receiving educational benefits, *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980). For example, plaintiffs allege that the individual plaintiffs and many members of the organizational plaintiffs must rely totally or primarily on Death and Disability Compensation for this support and the necessities of life. The fact that plaintiffs are applicants for new or additional benefits and not facing termination of existing benefits may somewhat reduce that weight of their interest, but does not eliminate it. *Ressler* at 1217. Their interest remains very substantial. Veterans killed or injured due to military service have lost all or much of their ability to earn a livelihood. For the veteran who has contracted an illness, "arbitrary denial [of benefits] could leave him with an uncompensated disability of lifelong duration and condemn him to 'suffer grievous loss.'" *Davis v. United States*, 415 F. Supp. at 1091. Veterans cannot sue for disabilities stemming from their military service under the Federal Torts Claims Act; compensation from the VA is their sole remedy against the

government. *Feres v. United States*, 340 U.S. 135 (1950). Moreover, the poverty and despair a veteran and his family may suffer from an uncompensated disability could frustrate the veteran's reintegration into civilian society. In addition, the court must weigh the psychological value to the veteran of being represented before the VA by the representative of his own free choice, including retained counsel, unhampered by any fee limit. *Cf. Devine v. Cleland*, 616 F.2d at 1088 (court "cannot ignore an important concern: the psychological value to the veteran of personally communicating with bureaucracy before it profoundly alters his entitled status").

Assessment of the "fairness and reliability of the existing ... procedure, and the probable value, if any," *Mathews*, 424 U.S. at 343, of removing the \$10.00 limit, will also require full development of the facts. Plaintiffs contend that the \$10.00 limit effectively precludes almost all veterans from obtaining counsel. They argue that the complexity of their claims, for example, proof of "service-connected" causation of disabilities due to radiation which have a long latency period, renders the right to choose to be represented by an attorney unhampered by the fee limitation particularly essential. They further contend that VA proceedings are adversarial and complex and that representation by service organizations is inadequate. Indeed, the government admits that veterans may at times be precluded by the fee limit from obtaining counsel even though counsel would be of significant assistance. (Brief in Support of Motion to Dismiss 10 n.3) Moreover, VA decisions are immune from judicial review. 38 U.S. § 211(a). As the Ninth Circuit observed in the context of pretermination procedures for veterans' educational benefits, the lack of judicial review in VA proceedings contrasts with the availability of judicial review under the Social Security Act and makes it "especially crucial that the VA's ... procedures guarantee the degree of accuracy and fairness we expect of governmental processes." *Devine*, 616 F.2d at 1088.

Finally, the court must consider the governmental interest in retaining the \$10.00 fee limit, and the additional expenditure and administrative burden, if any, that the gov-

ernment would incur if it were eliminated. The government has thus far advanced only one justification: protecting veterans from depletion of the amount of benefits awarded. (Brief in Support of Motion to Dismiss at 9:17-18) In the past it has been stated that the fee limitation served a dual purpose: protecting veterans from excessive fees and the government from fraudulent claims. *Calhoun v. Massie*, 253 U.S. 170, 173 (1920).

Plaintiffs argue that the original purposes of the fee limit no longer apply. The statutory fee limitation has existed in some form since 1862.² Originally, the fee limitations applied to the essentially clerical task of preparing claims forms. 13 Stat. 387 (1864) Later statutes distinguished between those essentially clerical functions for which a low flat fee limitation was maintained, and fees for litigated cases for which a percentage fee ranging from five to ten percent was authorized. 38 Stat. 711 (1914), 40 Stat. 102 (1917). (Apparently veterans previously had access to the courts in claims disputes.) Thus, the court in *Smith v. United States*, 83 F.2d 631, 640 (8th Cir. 1936), commented on the purpose of the flat fee limitation: "[t]he evident purpose of Congress was to protect veterans from extortionate fees for mere clerical assistance essential to the preparation and execution of the papers necessary to the presentation of their claims to the Veterans Administration."

The government clearly has no direct financial interest in the \$10.00 fee limitation, since the veterans seek only the right to *retain* counsel at their own expense, not to have the government foot the bill. Of course, if removal of the fee limit resulted in more successful claims due to more effective representation, government expenditures on veterans' claims would increase. However, denial of valid claims because of inadequate representation is not a legitimate

² In an act passed on July 15, 1862, Congress provided that payments to attorneys assisting in the procurement of pension or bounty claims would be limited to \$5.00, with additional small payments available under special circumstances. 12 Stat. 566 (1862). A subsequent series of statutes was passed amending this provision, and enacting similar provisions with respect to various groups. *E.g.*, 43 Stat. 628 (1924); 49 Stat. 2031 (1936).

government interest which this court may take into account in the due process calculus.

The government asserts only a paternalistic interest in protecting veterans from sharing their benefits with attorneys. This paternalistic interest in the fee limitation may not outweigh the veterans' interest in representation by counsel, particularly where First Amendment rights are also implicated, as discussed below. *Cf. In re Gault*, 387 U.S. 1, 35-37 (1966) (juvenile charged with delinquency has right to counsel and other procedural protections despite government's argument that juvenile proceedings are non-adversarial and safeguard the juvenile's best interest.) Moreover, the government's paternalism seems particularly misplaced here, where plaintiffs' claims have been denied. Plaintiffs obviously believe that their own best interests would be served by having the choice of securing legal representation which would increase their chance of success and sharing the proceeds, rather than ending up with nothing at all. Plaintiffs may be able to show that protection of veterans against unscrupulous attorneys by the drastic means of limiting fees to so low a sum as to eliminate legal representation altogether is no longer necessary. For example, they may show that abuse by attorneys is less prevalent now than it once was, and that the public is more sophisticated in dealing with attorneys. Veterans, of course, are adults generally presumed capable of making their own decisions. Further, plaintiffs may well be able to show that the claims process extends far beyond mere clerical work. Finally, it may be that less drastic measures, such as a reasonable limit on contingency fee recoveries, would adequately protect the government's interest while permitting veterans the option of representation by retained counsel.

Defendants argue that this court may not consider plaintiffs' due process claim because the statutory fee limitation has already been definitively upheld against due process challenges. Defendants cite the following cases: *Calhoun v. Massie*, 253 U.S. 170 (1920); *Margolin v. United States*, 269 U.S. 93 (1925); *Hines v. Lowrey*, 305 U.S. 85 (1938); *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975),

aff'd per curiam sub nom. Gendron v. Levi, 423 U.S. 802 (1976); *Hoffmaster v. Veterans Administration*, 444 F.2d 192 (3d Cir. 1971) (per curiam); *Staub v. Roudebush*, 424 F. Supp. 1346 (D.D.C. 1976), *vacated sub nom. Staub v. Johnson*, 574 F.2d 637 (D.C. Cir. 1978); and *Holley v. United States*, 352 F. Supp. 175 (S.D. Ohio 1971). The older Supreme Court cases, *Calhoun*, *Margolin* and *Hines*, are distinguishable; they were challenges by attorneys, not veterans as here, who attempted to collect more than the statutory fee and the decisions were based on a substantive rather than procedural due process theory. See *Gendron*, 501 F.2d 1087, 1088 (9th Cir. 1974). *Hoffmaster* and *Holley* simply relied on those earlier cases without recognizing this distinction. Finally, defendants fail to realize that the district court opinion in *Staub* upholding the statute was vacated and hence has no precedential value in this court.

Gendron did involve a veteran's challenge of the \$10.00 fee limitation on procedural due process and equal protection grounds. As in this case, the veteran charged that the \$10.00 limit precluded him from retaining an attorney. However, unlike this case, where plaintiffs have undertaken extensive discovery and made detailed factual allegations which they intend to prove, *Gendron* was tried on a meager set of stipulated facts without any proof that service organization representation was inadequate or that the veteran's claim was particularly complex. The district court in *Gendron* initially dismissed for want of a substantial federal question, and the Ninth Circuit reversed and remanded with instructions to convene a three-judge court. 501 F.2d 1087. The district court then upheld the constitutionality of the \$10.00 fee. It reasoned that an applicant for benefits, unlike a recipient threatened with termination, has no property interest in benefits. Accordingly, the court never reached the second stage of procedural due process analysis of determining what process was due. The court also rejected the equal protection challenge on the grounds that veterans' benefits were different from other benefit programs lacking the \$10.00 limit.

On appeal to the Supreme Court, the jurisdictional statement presented the following questions:

(1) Does an applicant have a property interest in disability benefits?

(2) Does § 3404 deprive veterans of property without due process of law?

(3) Does § 3404 deprive veterans of liberty without due process of law?

(4) Does § 3404 deprive veterans of equal protection?

(5) Did the district court improperly refuse to receive evidence of the inadequacy of representation by service organizations and their lay personnel offered by appellant at the trial of his action?³

The Supreme Court summarily affirmed. 423 U.S. 802 (1975).

This court must carefully examine the scope of the Supreme Court's ruling in *Gendron* to determine whether it

³ The exact questions presented were:

1. Is there a deprivation of property within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States when the Veterans Administration denies a disabled veteran's claim for disability benefits under 38 U.S.C. §§ 310-13?

2. Does 38 U.S.C. § 3404, which limits to \$10.00 the fee a retained attorney may receive for consulting with a veteran, or for preparing, presenting, and prosecuting the claim of a veteran seeking disability benefits under laws administered by the Veterans Administration, deprive veterans of property without due process of law, because a veteran is entitled to the procedural protection of retained counsel in unreviewable proceedings before the Veterans Administration?

3. Does 38 U.S.C. § 3404, as described above, deprive veterans of liberty without due process of law because the \$10.00 fee limitation arbitrarily and capriciously prevents a veteran from availing himself of a statutorily granted right to retain counsel?

4. Does 38 U.S.C. § 3404, as described above, deprive veterans of equal protection of the laws as guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States, because applicants for benefits before other agencies of the United States Government are not similarly prevented by fee limitations from retaining counsel to assist them?

5. Did the District Court improperly refuse to receive evidence offered by appellant at the trial of his action, which evidence would have tended to prove that private veterans' organizations and their lay persons do not provide adequate representation at hearings of the Board of Veterans Appeals to review denials of applications for "service-connected" disability benefits?

precludes plaintiffs' procedural due process challenge in this case. It is clear that summary affirmances are binding on this court, *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975), although they have considerably less precedential value than opinions on the merits, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-83 (1979). In applying summary affirmances as precedents, the district court must decide the difficult threshold question of whether the issues were properly presented to the Supreme Court and declared by the Court to lack merit. *Hicks*, 422 U.S. at 345 n.14. As the Court has recognized: "[a]scertaining the reach and content of summary actions may itself present issues of real substance." *Id.*

It is clear that when the Court summarily affirms, it adopts the judgment but not necessarily the reasoning of the court below. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Thus, summary affirmances only reject those specific challenges in the jurisdictional statement which the Supreme Court necessarily denied. 432 U.S. at 176-77. For example, in *Torres v. New York State Department of Labor*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd* 405 U.S. 949 (1972), the district court rejected a statutory and procedural due process challenge to New York's "seated interview" procedure for terminating unemployment benefits, and the Supreme Court summarily affirmed. Subsequently, an identical challenge was mounted against Connecticut's procedure, which also consisted of a seated interview concerning termination and suspension of benefits pending administrative appeal. *Steinberg v. Fusari*, 364 F. Supp. 922 (D. Conn. 1973), *vacated and remanded*, 419 U.S. 379 (1974). The district court in *Fusari* considered itself bound by the *Torres* summary affirmance on the question whether Connecticut complied with the statutory requirement of payment of benefits "when due." However, the court distinguished the constitutional issue on the grounds of Connecticut's greater delay in resolving administrative appeals than in New York and the failure of the *Torres* court to consider the probable accuracy of the challenged procedures. 419 U.S. at 388 n.15. The Supreme Court held that *Torres* did not bar consideration of the statutory issue be-

cause "many of the factual distinctions that the District Court relied on to distinguish *Torres* on the constitutional issue apply equally to the 'when due' question. *Id.* It observed that "[a]ny statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility inevitably will generate fact specific applications." *Id.* The Court therefore did not need to reach the constitutional question, and remanded as to the statutory question because Connecticut had amended its procedures in the interim. But the Court apparently endorsed the district court's distinction of the summary affirmance in *Torres* on the constitutional issue based on the highly particularized inquiry necessary for due process analysis, and clearly held that the district court should also not have considered itself bound on the statutory issue.

Having carefully considered the decision in *Gendron*, this court concludes that *Gendron* may only have affirmed the judgment of constitutionality as applied to the individual plaintiff there and thus does not bar plaintiffs' challenge here to the fee limitation as applied to them. The summary affirmance is binding only as to the issues properly presented and necessarily decided. The Supreme Court may not have adopted the district court's reasoning that veterans lack a property interest in disability benefits. It may only have decided that the individual plaintiff in *Gendron* had a property interest but that under the circumstances he received due process, without deciding the constitutionality of the fee limitation as applied to different plaintiffs under different circumstances. Analysis of procedural due process claims must be sensitive to the particular facts affecting the fairness of the proceeding. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Fusari*, 419 U.S. at 388 n.15. Important differences between the *Gendron* case and this one may lead to a different outcome in the due process balance. The record in *Gendron* was sparse; plaintiff made no showing that his inability to obtain representation by an attorney prejudiced his right to a fair hearing. Rather, the thrust of his attack was that the \$10.00 fee restriction on his ability to retain counsel was a per se violation of his due process rights. By contrast, plaintiffs here have engaged in

extensive discovery to support their allegations of the special difficulties of proving their claims and the prejudicial effects of the \$10.00 fee limitation on their ability to get a fair hearing. Unlike the plaintiff in *Gendron*, they allege and seek to prove that the lay representation provided by the service organizations is inadequate. Thus, while *Gendron* does bar a facial challenge to the statute as violative of due process in all its applications, it does not bar plaintiffs' challenge here that the statute as applied to them violates due process.

III. PLAINTIFFS' CLAIM THAT THE \$10.00 FEE LIMITATION DENIES THEIR FIRST AMENDMENT RIGHTS TO PETITION AND FREEDOM OF SPEECH AND ASSOCIATION

As a separate cause of action plaintiffs also allege that the \$10.00 fee limitation deprives them of their First Amendment rights to petition and to freedom of speech and freedom of association. They argue that the effective bar on legal representation deprives them of meaningful access to the VA in violation of their right to petition in that without the opportunity to retain counsel they cannot adequately assert their claims. They also claim violation of their rights to associate freely with each other, to employ counsel, and to associate freely and speak with attorneys to obtain legal advice and advocacy.

Plaintiffs' First Amendment theory is distinct from their due process claim. It has never been presented to the Supreme Court. It is clearly not barred by *Gendron*, since no First Amendment claim was raised in the district court or in the jurisdictional statement. See *Mandel v. Bradley*, 432 U.S. 173, 179-80 (1977) (Brennan, J., concurring).⁴ Moreover, by contrast to the procedural due process claim, no property or liberty interest need be established as a prerequisite to asserting a First Amendment claim. Cf. *Hilliard v. Scully*, 537 F. Supp. 1084 (S.D.N.Y.) (even

⁴ Even if it could be argued that a First Amendment challenge was somehow implicit in *Gendron*, summary affirmances do not resolve questions which "merely lurk in the record." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (citation omitted).

though prisoner had no liberty interest in being confined in any particular prison, his right to petition the courts could not be violated by transfer designed to obstruct his access to the courts).

The right to petition the government for redress of grievances is "among the most precious of liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). It has a long and distinguished lineage in constitutional law, dating back to the Supreme Court's recognition in *United States v. Cruikshank*, 92 U.S. 542, 552 (1876), that the right to petition is inherent in our very form of government. The right to petition is closely interwoven with the other precious First Amendment rights of free speech and association. *United Mine Workers*, 389 U.S. at 222. These rights extend to vigorous advocacy, beyond "abstract discussion, unrelated to action. The First Amendment is a charter for government, not an institution for learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

The Supreme Court has never directly addressed the question presented here. However, its cases establish the principal that the rights to petition, speech and association include the right to retain attorneys without barriers from restrictive regulation where legal representation is necessary to effective access to governmental processes. In a series of cases, the Supreme Court established the "basic right to group legal action," holding that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971) (discussing *NAACP v. Button*, 371 U.S. 415 (1963)); *Brotherhood of Railway Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar*, 389 U.S. 217 (1967). In those cases, the Supreme Court held that the First Amendment rights to petition, association, and speech protect efforts by organizations to achieve effective legal representation for

their constituents against state restrictions on solicitation of clients and unauthorized practice of law.

NAACP v. Button struck down the application of state bans on improper solicitation to the NAACP's efforts to provide legal representation for persons seeking legal redress for infringement of their civil rights. The Court stressed that the First Amendment protects "vigorous advocacy," not just abstract speech. 371 U.S. at 429. Although recognizing the state's valid concern with unscrupulous practices by attorneys, the Court stated: "[b]road prophylactic rules in the area of free expression are suspect...[The state cannot] under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 438-49 (citations omitted).

Subsequent Supreme Court decisions extended *Button's* protection of legal representation as a form of political advocacy to legal representation to advance purely economic interests. In *Brotherhood of Railway Trainmen*, 377 U.S. 1, Virginia sought to enjoin the union from recommending lawyers to members with federal compensation claims for railway injuries, claiming that the union's activities constituted improper solicitation of legal business and the unauthorized practice of law. The Court held that the Union's efforts to secure effective legal representation for its members, although not a form of political expression like the NAACP's activities, were also protected by the First Amendment rights of petition, speech, and association. *Id.* at 7-8. Moreover, the Court made clear that just as the First Amendment would not tolerate a direct ban on access to the courts, it would not permit Virginia's indirect interference with the right to petition by erecting barriers to access to effective legal assistance. Viewing access to legal representation as integral to meaningful access to the courts, the Court stated: "[t]he right to petition the courts cannot be so handicapped." *Id.* at 7.

Similarly, in *United Mine Workers v. Illinois Bar*, 389 U.S. 217 (1967), the Court held that the union's employment of a salaried attorney to represent its members in workers' compensation litigation was protected by the rights of free speech, association, and petition. While the

litigation, as in *Trainmen*, was aimed solely at economic compensation for victims of industrial accidents, the Court reiterated that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *Id.* at 223. The Court reasoned that a ban on the Union's provision of legal counsel to its members substantially impaired the Union's First Amendment rights, yet was not necessary to protect the states' interest in legal ethics. Finally, in *United Transportation Union*, 401 U.S. 576, the Supreme Court held that the Union's efforts to protect workers suing for FELA damages from excessive fees by incompetent attorneys were protected by the First Amendment.

The lower courts have also recognized that limitations on representation by attorneys trench upon the right to meaningful access to the courts and the right to free speech. For example, *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (Wald, J.) held that restrictions on federal employees' communication to their attorneys of information exempt under the FOIA "implicates the fundamental right of those employees to meaningful access to the courts" as well as their right to speak with their attorneys and their right to effective assistance of counsel. The court stated: "*while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights.*" *Id.* at 32 (footnote and citation omitted) (emphasis added). Similarly, prisoners have a right of meaningful access to the courts which encompasses all means necessary to a fair hearing, including access to legal assistance and information. *See, e.g., Bounds v. Smith*, 430 U.S. 817 (1977) (states must protect the right of prisoners to meaningful access to the courts by providing law libraries or alternative sources of legal information); *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (prison regulation severely limiting law books in prison libraries denied reasonable access to the courts, which "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary."

These cases establish that the First Amendment protects plaintiffs' right to retain legal counsel to represent them on their compensation claims free from unduly restrictive fee limitations if, as they allege, such representation is necessary for meaningful access to the VA. Indeed, the case is especially compelling here, because plaintiffs allege that the \$10.00 fee limitation achieves indirectly what a direct ban on legal representation would achieve directly. By contrast, in the union and NAACP solicitation cases, the restrictions on solicitation and unauthorized practice of law did not choke off access to lawyers completely but left individuals free to retain lawyers without the aid of those organizations. The restriction attacked here is more drastic.

It is clear that the right to petition extends beyond ensuring meaningful access to the courts to the right of access to administrative agencies. As the Supreme Court stated in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the right to petition is not limited to attempts to influence the legislature or executive:

[t]he same philosophy governs the approach of *citizens or groups of them to administrative agencies* (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government The right of access to the courts is indeed but one aspect of the right to petition.

(emphasis added). *See Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied* 434 U.S. 975 (right to petition protects complaint about IRS agent's professional conduct to his superiors); *International Union UAW v. National Right to Work*, 433 F. Supp. 474 (D.D.C. 1977) (right to petition extends to NLRB as well as courts); *Center for United Labor Action v. Consolidated Edison Co.*, 376 F. Supp. 699, 701 (S.D.N.Y. 1974) (right to petition extends to all departments of government, including state administrative agencies). Thus, the right to petition extends to plaintiff's claims before the Veterans Administration. Indeed, the right to effective access to the VA is particularly valuable here, because the VA is the sole forum for veterans' compensation claims. There is no judicial

review of VA decisions on claims, 38 U.S.C. § 211(a), and veterans cannot sue the federal government under the Federal Torts Claims Act for injuries arising out of military service, *Feres v. United States*, 340 U.S. 135 (1950).

The position of organizational plaintiff Swords to Plowshares is directly akin to that of the unions in *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 580, *Brotherhood of Railway Trainmen*, 377 U.S. 1, and *United Mine Workers*, 389 U.S. 217. Like the unions whose efforts to secure effective legal representation for their members were stymied by restrictive state regulation, Swords to Plowshares alleges that the \$10.00 fee limitation effectively precludes it from providing adequate legal representation to the veterans it was organized to assist.

Moreover, the right to petition extends to individuals as well as groups, as the same passage in *California Motor Transport* makes clear by including within the right to petition "the approach of citizens or groups of them to administrative agencies..." *Id.* at 510 (emphasis added). Similarly, the Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977), explained that the principle underlying the NAACP and union solicitation cases extends to individual efforts to obtain legal assistance:

Underlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups.

Thus, the right to consult legal counsel applies to the organizational plaintiffs, the veterans organizations who seek to aid veterans with their compensation claims, and the individual veterans pressing their claims before the VA.

The \$10.00 fee limitation implicates plaintiffs' First Amendment right to receive information and advice. As the Supreme Court has recognized, even purely commercial speech about the availability and price of legal services is protected by the First Amendment because "such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Bates v. State Bar of Arizona*, 433 U.S. at 364 (1977). Similarly, *Martin v.*

Lauer, 686 F.2d at 33, stressed the important interest of individuals in receiving early assistance from attorneys in assessing their legal rights when it struck down limitations on attorney-client communication.

As discussed above, the cases make clear that the veterans' petitioning of the VA to obtain economic compensation does not lose its First Amendment protection because it is motivated primarily by economic self-interest. See, e.g., *United Mine Workers*, 389 U.S. at 223; *California Motor Transport*, 404 U.S. at 510-11. The court notes, however, that compensation claims of veterans like the individual plaintiffs' and Vietnam veterans represented by the organizational plaintiffs implicate political values as well, because of their connection with public controversies over the safety of nuclear weapons and chemical defoliants and the psychological stress allegedly engendered by participation in the Vietnam War.

The fact that the statute does not bar representation by attorneys outright, but instead effectively achieves the same result indirectly, does not of course immunize the statute from First Amendment infirmity. As the Supreme Court ruled in *Brotherhood of Railway Trainmen*, the government cannot indirectly handicap access to the courts anymore than it can directly bar access. 377 U.S. at 7. Indeed, although it is difficult to conceive of a measure which would ban a business seeking a license from a regulatory agency or a government loan or indemnity payment being represented by an attorney paid more than \$10.00, this is such a statute.

The fact that the limitation attacked here is an expenditure of funds for legal representation also does not take the statute outside the purview of the First Amendment. The Supreme Court has recognized that expenditure of funds for advocacy of political or economic interests is protected speech. *Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976) (per curiam) (limits on campaign expenditures directly and substantially restrain speech); *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Counsel, Inc.*, 425 U.S. 748, 761 (1976) ("speech does not lose its First Amendment protection because money is spent to protect

it"). Thus, the court in *International Union U.A.W. v. National Right to Work*, 433 F. Supp. at 481-83, held that a statutory ban on employer and employer association financing of lawsuits and administrative proceedings initiated by employees against unions violated the employers' right to petition.

Defendant argues that *Schweiker v. McClure*, 456 U.S. 188, 199 & n.14 (1982), establishes that representation by an attorney is not necessary to the exercise of plaintiffs' right to petition. However, *McClure* did not involve a restriction on claimants' ability to retain counsel to represent them in claims proceedings. Rather, in *McClure*, plaintiffs sought to require the government to provide at its expense lawyers to act as hearing officers in Medicare claims. The Supreme Court held only that due process did not require that Medicare hearing officers be attorneys. The claim here is completely different. Plaintiffs do not argue that the VA hearing officers must be attorneys, or even that the government appoint attorneys at government expense to represent veterans in claims proceedings. Plaintiffs only seek the right to hire counsel at their own expense.

Defendants also cite *Bush v. Lucas*, 103 S.Ct. 2404 (1983), and *Chappell v. Wallace*, 103 S.Ct. 2362 (1983). In *Bush*, the Court refused to allow a *Bivens* type of action, 403 U.S. 388 (1971), by military personnel against their superiors for civil rights violations. In *Chappell*, the Court refused to create a *Bivens* cause of action for federal employees to sue their supervisors directly under the First Amendment because of Congress' provision of elaborate, though less generous, civil service remedies. The court fails to see the relevance of these cases. Plaintiffs do not seek a judicial remedy for their death and disability claims, but only fair administrative proceedings.

Thus, plaintiffs have stated a First Amendment claim based on their allegations that the \$10.00 fee limitation renders them unable effectively to petition the VA for death and disability benefits, and substantially impedes the individual plaintiffs' ability to associate and communicate with attorneys about their claims, and the organizational plaintiffs' ability to associate for the purpose of providing

legal representation to their clients. If plaintiffs are able to establish their allegations defendants, to save the statute from constitutional infirmity, will have to show, at a minimum, that the \$10.00 fee limitation is necessary to achieve an important governmental interest unrelated to the suppression of First Amendment rights. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The government will face a difficult burden in justifying the \$10.00 fee restriction on veterans' freedom to retain counsel, because "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438. Moreover defendants' asserted justification for the limitation—protection of veterans from improvident attorneys fees agreements—runs afoul of the First Amendment's hostility to restrictions on speech justified by paternalism. Thus, the Supreme Court rejected the "highly paternalistic approach" of banning advertising of prescription drugs to protect consumers against rash choices because the First Amendment assumes "that people will perceive their own best interests if only they are well enough informed and that the best means to that end is to open the channels of communication rather than close them." *Virginia State Board of Pharmacy*, 425 U.S. at 770; see *Bates*, 433 U.S. at 365.

IV. CONCLUSION

Plaintiffs have stated claims under the Due Process Clause of the Fifth Amendment and the First Amendment. Accordingly,

IT IS HEREBY ORDERED that defendants' motion to dismiss is DENIED.

Dated: October 21, 1983

/s/

MARILYN HALL PATEL
United States District Judge

**DECLARATION OF WALTER R. ATLEE
(CAPTION OMITTED)**

I, WALTER R. ATLEE, do hereby declare and state as follows:

1. I am a veteran of the United States armed forces. I served in the United States Air Force from 1954 through 1957, when I was honorably retired for a service connected disability. I know the facts recited herein of my own knowledge and if called upon could competently testify thereto.

2. In June 1957 I began to receive veterans' disability compensation for my osteomyelitis and related orthopedic condition. The V.A. determined in June of 1957 that I had a one-hundred percent rating for my service connected medical condition.

3. I am still receiving disability compensation for my osteomyelitis and other orthopedic problems. In October 1982, however, the San Francisco Regional Office of the Veterans Administration reduced my disability rating from one hundred percent to seventy percent. This reduction was made retroactively to 1966. I did not receive any hearing before the reduction in my disability rating was made. I subsequently received a notice of my right to a hearing but knew a hearing would be futile without an attorney to represent me. Further, I had serious difficulty in finding an authorized Veterans' group that would represent me. The American Red Cross, which held my power of attorney, withdrew its representation without telling me why, just when I needed it most. I tried to battle the V.A. by letter, but all of my pleas were ignored. All of their arguments cite laws, regulations and rulings of which I am not aware.

4. The V.A. has commenced an action to recover the alleged overpayment that they claim I received between 1966 and 1982. The total amount that they are asking me to pay is in excess of \$71,000. The V.A. is now attempting to cut off my compensation entirely in order to "recoup" the alleged overpayments. The V.A. also withheld all authorized disability compensation from me for a period of two months without explanation.

5. 38 U.S.C. § 110 specifically provides that a disability compensation rating in effect for 20 or more years cannot be reduced except upon a finding of fraud. Fraud is the sole criterion for reducing protected ratings. The V.A. has not found that I committed any fraud, yet they have reduced my disability rating retroactively all the way back to 1966. The V.A. claimed that it could establish "supplemental" reasons for reducing my compensation rating even though my rating had been in effect for 25 years. I argued that they took an action which was clearly prohibited by law.

6. The V.A. has denied me constitutional due process by preventing me from hiring an attorney to defend myself against the reduction of my compensation. The V.A. also ignored two separate legal opinions which they had requested—one from the United States Attorney in San Francisco and another from an Assistant U.S. Attorney General. Both cited the absence of fraud on my part and strongly criticized the V.A. Regional Office for serious administrative deficiencies in my case.

7. The V.A. knowingly withheld irrefutable evidence which could have demonstrated that I was not guilty of any fraudulent act. The V.A. claims that I never notified them that I was employed by the State of California. The V.A. possesses evidence, however, that I notified them of my employment in a timely manner. This evidence has been withheld because it demonstrates material fault by the V.A. and illustrates that I was not guilty of any fraudulent act.

8. Without my consent V.A. officials in San Francisco allowed confidential and privileged records protected by the rigid safeguards of the Privacy Act to be illegally disseminated to the press. The V.A. subsequently discussed facets of my claim with the press without my permission and implied wrongdoing on my part. The V.A. took no action to stop or dissuade the press from using confidential records taken from my V.A. files. Various articles regarding my claim were published widely in the press and each quoted a V.A. statement alleging wrongdoing on my part. Immediately after this highly negative press coverage, my employment with the State of California was terminated without

any explanation. The V.A. refused to request an investigation into the criminal theft of my records although I made such a request on two occasions.

9. The V.A. refused to investigate a probable criminal violation of law by the service officer at the San Francisco, California, Department of Veterans Affairs who held my power of attorney. A preliminary investigation indicated that he may have been involved in illegally releasing my records to the press, but the investigation was dropped.

10. In addition, the V.A. has refused to act upon, or investigate, my provable claim that the San Francisco Adjudication Officer was making biased, negative statements that were prejudicial to me. This employee supervises V.A. staff members who make recommendations or decisions regarding my disability claim.

11. The V.A. refused to weigh medical evidence submitted, in 1982, by my authorized representative in support of my claim. This medical evidence revealed continued non-union of the right femur and the left ulna, loss of use of right leg, degenerative arthritis in both hips, calcific tendonitis in both shoulders and osteomyelitis. All the foregoing demonstrate that my service-connected disability is growing more severe rather than improving.

12. The V.A. has forced me to seek redress from staff representatives who are biased against me and who have privately and officially accused me of fraud. Accordingly, the V.A. is forcing me to handle my complex legal problem with the help of only lay personnel while the V.A. has access to many attorneys who seem to be focused on rejecting any claims that I may make.

13. In short, the San Francisco Office of the V.A. has consistently taken a directly adversarial position in their contacts with me. The V.A. has engaged in harassing and punitive acts which I believe have grossly violated my statutory and constitutional rights. I am prevented, however, from hiring an attorney to represent me in these legal actions. The V.A. is asserting the dual prohibition that I cannot seek redress in the courts and cannot compensate an attorney in an amount over \$10. Therefore, no attorney will represent me.

14. Without removal of the fee limitation, I will have no ability to obtain the assistance I desperately need to vindicate myself, reestablish my good name, and restore the disability benefits to which I am lawfully entitled. My entire family is damaged by my inability to defend myself from the illegal actions of the V.A. and this compounds the anguish that I am forced to experience.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 1983

/s/ _____
WALTER R. ATLEE

**DECLARATION OF WALTER R. ATLEE
(CAPTION OMITTED)**

Clarence William Autrey declares and states as follows:

1. I am a veteran of the United States Army and the United States Air Force, having served in the Army from 1954 to 1957 and in the Air Force from 1957 to 1967. I am 48 years old and am a resident of Empire, California. I am not a member of NARS or Swords to Plowshares. I know the facts stated in this Declaration from my own personal knowledge, and if called, could and would testify to them.

2. While in the Army, I was transported to Eniwitok in the South Pacific for a series of atomic bomb tests there. I was assigned to general duty at the NCO Club and witnessed approximately six atomic bomb explosions. No protective measures were taken to guard me against radiation exposure and we were not warned of the hazards involved. While at Eniwitok, I swam in the water frequently and occasionally rode in a patrol boat in the immediate vicinity of sites of the nuclear blasts.

3. While I was in the Air Force, I was assigned to duty as a military policeman guarding nuclear weapons facilities at Geiger Field in Spokane, Washington and at Manzano Air Base, New Mexico, which is near Sandia Laboratories and Kirkland Air Force Base.

4. In approximately 1968 or 1969 I had several lymph nodes which had mysteriously swelled removed from my right arm. They were surgically removed by a Dr. Kurita in Modesto. In more recent years, and for the first time in my life, I have suffered from lethargy, listlessness, depression, insomnia, and loss of appetite. For the last year or so, I have experienced deep pain in the area of my neck. In approximately June 1983, I was diagnosed at the V.A. Hospital in Livermore as having "hot" or growing nodules in my thyroid. The V.A. doctors are considering surgical removal, and I am scheduled for another examination in approximately six weeks. At about the same juncture, my teeth started to fall out, which Dr. Gulang at the V.A. Hospital in San Francisco attributed to my thyroid problem. Five of my teeth were extracted by Dr. Navarro at the San Francisco V.A. Hospital. I am informed that the latter

problems can be caused by exposure to radiation. In addition, over the past several years, I have been treated for unexplained growths on the soles of my feet, which are similar in appearance to large corns. They are extremely painful. None of the doctors I have visited have been able to figure out the cause of these growths. Finally, I was recently diagnosed by Dr. Yang, a V.A. cardiologist, as having a leaky heart valve. He has instructed me to avoid stressful situations.

5. In approximately 1977, I went to visit a veterans service officer at the local V.A. Office in Modesto to explore the possibility of filing a service-connected disability claim. I believe his name was Ira Wilson. He met with me for an extremely short time—less than ten minutes. He did not ask to see any of my medical or service records or inquire into my medical problems. When I asked him about filing a radiation claim, he simply indicated that I had no claim. I was disappointed, and merely dropped the matter.

6. Again in August or September 1983, I went to see a veterans service officer, this time at the V.A. Hospital in Livermore. I made an appointment, but became upset when we were constantly interrupted during our chat and the service representative did not appear interested or capable of helping me.

7. I am extremely poor and my sole source of income is disability payments of \$605.00 a month which stem from a work-related accident that seriously injured my elbow. I am also blind in my right eye. I have been unable to work since 1979. No one will hire me because of my disabilities.

8. I am very scared about my physical condition. I am so bitter about what has happened to me that I find it difficult to even talk about it. My mental condition has deteriorated markedly over the last few years. I do not know how to go about filing or pursuing a V.A. claim. I would like to employ an attorney on a contingency fee basis to prepare and handle my V.A. claim, but have been unable to do so because of the \$10.00 limitation on attorneys' fees. I firmly believe that the fee limitation is unfair and drastically interferes with my ability to obtain redress for my service-connected injuries.

I declare under penalty of perjury that the foregoing is true and [sic] correct. Executed on September 24, 1983 at Empire, California.

/s/ _____
CLARENCE WILLIAM AUTREY

**AFFIDAVIT OF RONALD G. BAKAL
(CAPTION OMITTED)**

I, RONALD BAKAL, first being duly sworn, do hereby declare and state as follows:

1. I am an attorney duly licensed to practice law in the state of California. I have been practicing for more than 12 years. I have specialized in litigation primarily in the personal injury field. For the last eight years I have worked vigorously in obtaining compensation for the victims of exposure to radiation. I was counsel to the people of Marshall Islands and helped them secure Congressional compensation for their damages. I have also represented numerous veterans and civilians in litigation under the Federal Torts Act. I was and still am counsel on *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981).

In 1977 I undertook to represent the widow of Major Charles Broudy in her claim against the Veterans Administration for in service death benefits claims. I have spent more than 500 hours representing her at no charge. I have spent enumerable hours trying to find records from the various agencies of the federal government. On four occasions her claims were rejected, including one in front of the National Appeals Board in Washington, D.C. That hearing took me at least two full weeks of preparation. I was shocked at the condition of the Veterans Administration file in Washington. It was disorganized and contained documents from other Veterans. The hearing officers were basically unknowledgeable about radiation-related diseases. It took me at least two months to get the Veterans Administration to allow me to represent my client. These cases are extremely complex and require knowledge of law, physics and medicine.

There is little chance for these Veterans to collect compensation from civil lawsuits due to Federal Immunity laws.

I have had over 1000 requests for me to represent Veterans in Veterans Administration proceedings, but because of the lack of economic considerations I have refused.

Many Veterans chose not to go forward because of not being able to hire counsel. I have found the post-service or-

ganizations aids unknowledgeable in the legal and scientific areas necessary for effective representation.

Attorneys have represented millions of individuals in California Worker's Compensation cases, which are similar in nature to Veterans Administration claims with few complaints, and the system has been deemed to be a fair one.

I know that the Veterans claims procedure is an adversary proceeding and in most areas are too difficult for lay people to deal with. The current \$10.00 rule is unfair and it denies counsel to needy American citizens.

/s/ _____
RONALD G. BAKAL

DATED: 3/30/83

Suscribed and sworn before
me this 30th day of March,

/s/ _____
NOTARY PUBLIC

AFFIDAVIT OF MARY BALUSS (CAPTION OMITTED)

Mary Baluss, being first duly sworn, does hereby declare and state as follows:

1. I am an attorney duly licensed to practice in the District of Columbia. I am a 1975 graduate of the National Law Center, George Washington University and have at all times since November 25, 1975 been a member in good standing of the Bar of the Court of Appeals for the District of Columbia. From September 1975 to the present, I have been associated with the law firm of Steptoe & Johnson Chartered, specializing in litigation. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. §§ 3404-3505 and the nature of plaintiffs' claims in this action.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereof.

3. Since 1975 I have actively involved myself in the *pro bono* representation of former members of the armed services in a variety of cases. Particularly relevant to the case at bar, in 1975 and 1976 I was counsel of record for Emanuel R. Staub, a veteran who had repeatedly tried and failed to attain paid counsel to prosecute his claim for veterans benefits due to injuries received while serving in World War II. At the time that I began his representation, Mr. Staub had already been denied benefits. Although I do not have personal knowledge of the poor representation that Mr. Staub was given by representatives of the veterans organizations practicing before the Veterans Administration, I witnessed Mr. Staub sign the original of the attached Affidavit of Emanuel R. Staub and of my own knowledge, state that it is a true and correct copy thereof and that the original was filed with the Clerk of the District Court for the District of Columbia in *Staub v. Johnson*, Civil Action No. 73-1640. In his affidavit, Mr. Staub details the inattention given by his "representatives" and his own confusion and inability to represent himself adequately. I have myself reviewed verified transcripts of Mr. Staub's hearings. In neither did his "representatives" make a sub-

stantive presentation, assist with Mr. Staub's presentation or take any active role in clarifying for Mr. Staub the questions being presented.

4. From my detailed review of Mr. Staub's record, the factual development made on his behalf was minimal. Mr. Staub's medical documentation, in particular, was incomplete. Moreover, Mr. Staub was poorly prepared to respond to questions from a board composed of a doctor and two lawyers. Under these circumstances, his "hearing" was a meaningless formality.

5. Also attached hereto is a true copy of the Affidavit of Harold J. Nussbaum, the original of which is also on file in the District Court for the District of Columbia. Mr. Nussbaum, now a lawyer in private practice, served for a time as a non-lawyer service organization representative. His affidavit states unequivocally [sic] the need for legal representation in Veterans Administration proceedings and describes the conflict of interest inherent in veterans' representation and assistance by the service organizations or by Veterans Administration employees.

6. Because of publicity given Mr. Staub's case, I was contacted over a very short period by as many as 30 former servicemen seeking assistance. All had made some efforts to represent themselves or had been "assisted" by service organization representatives. All believed they had been seriously disadvantaged by lack of legal counsel. Because of the fee limitation, I was unable to represent these individuals.

/s/ _____
MARY BALUSS

DISTRICT OF COLUMBIA) ss:

Subscribed and sworn to before me this 1st day of July 1983.

/s/ _____
NOTARY PUBLIC
My commission expires 9/14/87.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1640-73

EMANUEL STAUB, PLAINTIFF,

v.

RICHARD L. ROUDEBUSH, DEFENDANT.

AFFIDAVIT OF EMANUEL STAUB

Comes now the plaintiff, Emanuel Staub, and being duly sworn, states as follows:

1. I, Emanuel Staub, was a member of the United States Marines, on active duty from 1936 until 1947 and on reserve duty from 1954 through 1964. As a consequence of that service, I am entitled to applicable veterans benefits.

2. I suffer from a painful and disabling spinal condition which I believe to have been caused by a combat incident of World War II, and for many years have been unable to work long hours and, for long periods of time, unable to work at all. In 1968, I applied for disability payments under 38 U.S.C. § 310.

3. My application was turned down by the Philadelphia regional office of the Veterans Administration. At this prehearing stage I was "counseled" by the Jewish War Veterans organization to the extent only that I was given help in filling out forms. Little or no substantive advice was offered. Following the determination that my disability was "not service connected," I obtained a hearing at the regional level. At the regional hearing, the Veterans Administration was represented by a panel consisting of a doctor, an attorney and an occupational specialist. I was questioned by these panel members as to the nature of my disability and my belief that it is service connected.

4. I was accompanied by a representative of the Jewish War Veterans to the hearing, but that person did not participate in the proceedings in any way other than to make a brief general statement to the board that I had a "good service record" and that he "hoped my application would be

considered." I was not counseled in advance of this hearing as to the most effective means of presenting my case or as to additional information which I might usefully present there.

5. The regional board reached no conclusion regarding the merits of my case and I was then automatically granted a hearing before the Board of Veterans Appeals in Washington, D.C. Although hearings before this board are the decisive and, in most cases, the final administrative proceeding within the Veterans Administration, I was given no advance counsel as to the nature of the proceedings or means by which I might best present my case. "Assistance" from the Jewish War Veterans counselor assigned to help me consisted entirely of a less than twenty minute interview immediately prior to the hearing, at which no matters substantive to my case were discussed. In fact, during much of that short period my counselor seemed primarily concerned with reading his mail.

6. When we arrived at the hearing, my counselor greeted the members of the panel as if they were old friends, and conversed with them about unrelated matters. When the hearing began, my counselor's sole role was to introduce me and, after my testimony, to tell the board that my record and case deserved consideration.

7. The Board of Veterans Appeals panel before which I appeared consisted of two attorneys, one of whom was the presiding member, and one doctor. As at the earlier hearing, I was questioned regarding my physical condition and the details of my claim that my disability is service connected. During the course of this questioning, I was at times confused by the seemingly irrelevant nature of some questions and by the nature of details sought.

8. After the hearing, I was notified that the Board of Veterans Appeals had denied my claim. I continued however to believe that the claim was well founded, and I discussed with others my feelings that my case had been poorly presented and not fully considered. One person, a law student, suggested that I contact a fellow student who had worked for the Veterans Administration. That student, after hearing my story, commented that I should have had

an attorney, and told me that "95% of the cases that are turned down could be won if the veterans had a lawyer." From him I also learned for the first time of the fee limitation in veterans' cases.

9. In the next few weeks I successively contacted seven attorneys in the Washington, D.C. area. Each refused to represent me. I believed that the fee restriction was an important aspect of these refusals. I further called an attorney in New York City who had recently received some publicity for representing servicemen in other types of cases; this person also refused to represent me.

10. I believe that denial of my claim by the Veterans Administration was due to the fact that I was unable to present my case properly and to articulate my claim. I do not feel that the presence of an advisor from the Jewish War Veterans in any way furthered my presentation beyond assistance with basic paperwork. Moreover, on expressing my concern after the Philadelphia hearing and suggesting that perhaps I should seek legal advice, the Jewish War Veterans representative discouraged such a move and told me that legal assistance would be no more effective than their help. I relied on this representation and believed incorrectly I would be actively represented in Washington. I do not know the training or background of the two "advisors" who accompanied me to my hearings, but I do know that they seemed unable to actively represent me during the hearings. Nor do I feel that I received the assistance I needed to organize my case and collect material for inclusion in the record.

/s/ _____
EMANUEL STAUB

DISTRICT OF COLUMBIA) SS:

I, SHIRLEY F. KOHN, a Notary Public of the District of Columbia, hereby certify that on July 8, 1976, Emanuel Staub appeared before me and being duly sworn, stated that the above Affidavit by him signed is true and correct to his knowledge, information and belief.

/s/ _____
NOTARY PUBLIC
MY COMMISSION EXPIRES SEPTEMBER 14, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1640-73

EMANUEL STAUB, PLAINTIFF,

v.

RICHARD L. ROUDEBUSH, DEFENDANT.

AFFIDAVIT OF HAROLD J. NUSSBAUM

Comes now Harold J. Nussbaum, and being duly sworn, states as follows:

1. I, Harold J. Nussbaum, am a member of the Bar of the District of Columbia. For many years I have represented individuals in numerous different types of legal proceedings involving various laws concerning veteran benefits. For example, I have represented many servicemen, veterans and their beneficiaries in court proceedings involving claims arising under insurance policies issued to servicemen and veterans. Additionally, I have also represented numerous widows and veterans in compensation and pension mandamus actions which, until the 1970 amendment of 38 U.S.C. § 211, could be brought before federal courts.

2. Of direct and immediate concern to the issues raised in the above-captioned proceeding, I am personally very familiar with proceedings before the Veteran's Administration, with the importance of legal representation at those proceedings, and with the practical prohibition of such representation, which has directly resulted from the \$10 maximum on the fees that an attorney may collect for any representation before the Veteran's Administration. 38 U.S.C. § 3404.

3. From 1947 to 1953 I served as National Service Officer of the Disabled American Veterans in the Veteran's Administration's central office. In this capacity I presented literally thousands of cases for adjudication by the Veteran's Administration. During this period, in 1949, I began formal legal training at American University. While completing

my law school education I continued, from 1951-53, to present cases for adjudication before the Veteran's Administration while I continued to serve as National Service Officer of the Disabled American Veterans. The recoveries which I obtained on behalf of veterans dramatically increased *after* I received formal legal training. I believe that this success on behalf of the claimants that I represented is specifically attributable to the fact that as a lawyer I was a far more effective representative of veterans than a non-lawyer.

4. In 1953 I left the Disabled American Veterans and entered private practice. Since that time the \$10 limitation placed on the fees an attorney may collect for representing a claimant before the Veteran's Administration has made it an economic impossibility for me to be directly involved in such representation except on an occasional basis.

5. Administrative hearings before the Veteran's Administration are based on a complex statutory and regulatory framework. By virtue of their legal training, attorneys are generally more able to understand and deal with the complexities of this framework than are those not trained in the law. There are many instances which vividly demonstrate the importance of being represented by an attorney before the Veteran's Administration. The familiarity of a lawyer with the difficult legal questions which often arise in proceedings before the Veteran's Administration is at times crucial to the veteran. For example, I have personally been involved with situations where a veteran has been charged with attempting to recover a fraudulent claim from the Veteran's Administration. Obviously such a charge raises significant legal questions involving all the elements of fraud, with which laymen are generally unfamiliar. Additionally, a finding of fraud could possibly result in referral of the matter to the U.S. Attorney and perhaps an indictment of the veteran.

6. Beyond the complexities of Veteran's Administration law and regulations, an attorney is by training equipped to deal with the administrative procedure itself and with the gathering and presentation of evidence which effectively links a veteran's personal situation to his legal entitlement.

In my experience an advocate's approach to such presentation is an important factor in successful representation.

7. Few veteran's organizations provide veterans with representatives who are legally trained or who are members of the bar. The limited training which these representatives have had, and the close relationship which those representatives maintain with the Veteran's Administration severely impair the effectiveness of their representation. Additionally, although employees of the Veteran's Administration may be contacted to "assist" a claimant, again such contact representatives are not attorneys and are not bound by the same loyalties and ethics that bind an attorney to his client. Indeed, those contact representatives are dependent upon their employer, the government, for their job efficiency ratings, thus further severely limiting the effectiveness of such representation.

/s/ _____
HAROLD J. NUSSBAUM

District of Columbia)SS:

On the 8th day of July, 1976, before me came Harold J. Nussbaum, to me known to be the individual described in and who executed the foregoing affidavit and acknowledged that he executed the same.

/s/ _____
(SEAL)

My commission expires: 3/15/77

DECLARATION OF JAMES L. BIANCHI (CAPTION OMITTED)

I, JAMES L. BIANCHI, do hereby declare and state as follows:

1. I am an attorney duly licensed to practice law in the State of California. I commenced my civil practice as a sole practitioner in 1979, that maintains an emphasis in the areas of Administrative Law, Small Business Law, Military Law, and Veterans advocacy conducted pro bono. I am also experienced in Personal Injury, Wills, Trusts and Estate Planning. My experience with veterans advocacy commenced during my law school apprenticeship in 1974 during which I represented veterans at V.A. proceedings as a Certified Veterans Representative. The cases included a variety of matters related to establishing that a disability was service-connected, often resulting in hearings before the Board of Veterans Appeals. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. Secs. 3404-3505 and the nature of plaintiff's claims in this action.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

3. My most recent case involved the widow of a veteran who committed suicide. He suffered the classic symptoms of Delayed Stress Reaction after the War in Viet-Nam, and it clearly resulted in his suicide. His widow attempted to secure V.A. benefits for herself and their ten year old son, but would be denied on the basis that she could not prove that the suicide was service connected. The previous representation she received from the State funded Department of Veterans Affairs was competent [sic] in guiding her through the complex procedure, but was not able to provide effective representation in this type of unusual case. She had to prove that the suicide was connected to a mental disorder, and that the disorder was related to his service in Viet-Nam. The difficulty in doing so was compounded by the fact that Delayed Stress Reaction was not yet fully recognized by the V.A. as being a mental disorder related to

service. We prevailed, but only after spending numerous hours with medical/legal research, and covering general principles of Administrative Law not commonly known to the non-lawyer veterans representatives. Some Constitutional issues also had to be raised before the Board. Without the help of a lawyer, I am reasonably certain that she would of lost. Due to the \$10 fee limitation, I elected to represent her without compensation. She resented that fact that she was not permitted to provide me with some compensation using the substantial retroactive payment she received as a result of my work.

4. I have experienced that the nature of claims being presented to the V.A. have become more complex and difficult to establish. Claims related to Delayed Stress, or Agent Orange present cumbersome problems in establishing the burden of proof required to show a service-connection. Veterans forced to represent themselves in these cases suffer extreme frustration in trying to establish these claims without proper representation. These cases often involve the need for technical or scientific data in the possession of the military; information they do not know exists or how to acquire.

5. The traditional veteran's organizations make an enthusiastic effort to assist veterans with their claims. Nevertheless, their expertise has often proven to be limited to matters of procedure. I have witnessed several cases where the veterans non-attorney representative failed to understand the law involved in a particular matter, and made very little effort to do more than have the veteran explain what happened, and obtain a few character references. This approach is useful to obvious cases requiring little proof, but is ineffective in those cases presenting legal or factual problems, especially in situations where the military records are missing.

6. I do not wish to malign the work of the traditional veterans organizations. They can be most helpful in representing veterans. However, their legal training is often limited, and their workloads often preclude giving each case the attention it may require. As a consequence, their assistance in unusual cases is often ineffective; raising false

hope with the veterans being represented. I represent veterans at the administrative appeal stage of V.A. proceedings. Almost all of my clients were represented by traditional veterans groups at the proceedings below, decisions that were often reversed once an attorney became involved.

7. Few lawyers have bothered to become familiar with veterans law due to the token compensation allowed. The few of us that are willing to represent veterans without compensation are limited in the number of pro bono cases we can handle. As a consequence, there are veterans improperly being deprived benefits who cannot obtain the effective representation they require. I have regretfully declined to represent veterans at times due to this severe fee limitation. Such cases involved the need to expend substantial costs to acquire the proof needed, amounts that would exceed my sparse reserves for pro bono work.

8. I understand the motivation behind this fee limitation. However, this effort to protect veterans has become excessive to their injury. I suggest that reasonable representation can be compensated while limiting the apprehension that an unconscionable portion of the veterans benefits would be diverted to overzealous attorneys'. Social Security claimants can obtain attorney representation. Attorneys are normally paid only if they prevail, the compensation normally comes from the retroactive lump sum payments due and not current monthly payments, and the fee must be approved by Social Security upon submission of time records by the attorney. I have represented many disabled clients before Social Security, and have found this arrangement quite effective in giving them the representation they need, without reducing the monthly payments, they rely on for survival, to pay an attorney's fee.

DECLARATION

I, JAMES L. BIANCHI, declare under penalty of perjury that the foregoing is true and correct, this declaration being executed at San Francisco, California on April 12, 1983.

/s/

JAMES L. BIANCHI

DECLARATION OF JOHN BURKE (CAPTION OMITTED)

I, John Burke, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Navy and a member of the National Association of Radiation Survivors. I live in Evergreen, Colorado. I know the facts recited herein of my own knowledge and if called upon could testify competently to them.

2. I was on active duty with the Navy from July, 1945 to October, 1947. I then went into the Naval Reserves until September, 1950, when I was called back into active duty. I was honorably discharged in September, 1951.

3. I was ordered aboard the U.S.S. Bowditch as a quartermaster on September 29, 1946. The day before that, the Bowditch had been at the Bikini Atoll in the Marshall Islands for the atomic test blasts of Operation Crossroads.

4. The Bowditch had been in the harbor of the Bikini Atoll for two months, participating in several atomic test blasts. The ship had reached the height of its radioactivity and was ordered to leave the Bikini Atoll to be decommissioned.

5. The Bowditch, with me aboard, sailed from the Bikini Atoll to Pearl Harbor, where we were quarantined until the ship got clearance to return to San Francisco for decontamination. At Pearl Harbor we were ordered to throw all of our gear overboard because it was contaminated by radiation. We were then ordered to proceed to San Francisco for decontamination. On the way to San Francisco I was ordered to scrape radioactive barnacles from the sides of the ship. In addition, on the Bowditch, I was drinking water and eating food contaminated by radiation. I was never given a radiation film badge nor any protective clothing.

6. On October 19, 1946 the ship went into drydock at San Francisco. Civilian sandblasters, who had demanded triple time pay, began removing barnacles from the sides of the ship. We inhaled the fumes from this blasting as we worked on the deck of the ship. We were ordered to throw the lifeboats overboard because they were contaminated by radiation.

tion. Scientists from the Lawrence Livermore Laboratory and from the University of California visited the Bowditch wearing protective breathing gear. I stayed aboard the Bowditch until it was decommissioned in February or March of 1947 in Norfolk, Virginia.

7. As a result of my exposure to ionizing radiation I suffer from a number of illnesses. I have skin cancer and have had three cancers surgically removed from my face. I have also had a tumor removed from my colon. I also suffer from calcification of the aorta, osteo arthritis, stomach ulcers, anemia, hypo-thyroidism and respiratory problems. Alcoholism and mental problems as a related item.

8. I filed a claim for service connected disability compensation with the V.A. in September, 1980. I was represented by the Disabled American Veterans ("DAV"). The V.A. rejected my claim because I was not aboard the Bowditch during the atomic blasts and there was no documentation to prove that my disabilities were caused by radiation. Since then, I have attempted, on my own, to gather documents to support my claim. I have refiled twice with additional evidence. Both times the V.A. again rejected my claim. When the V.A. rejected my claim the third time, I appealed to the Board of Veterans Appeals ("BVA"). I was told by the V.A. that I would have to wait two to five years to get a BVA hearing in Denver. Therefore, I traveled to Washington, D.C. at my own expense for a hearing before the BVA. The hearing was held on May 11, 1983.

9. I was represented before the BVA by a Washington, D.C. representative of the Disabled American Veterans. He got my file about thirty minutes before I walked in the door. When I came to his office he told me that I did not have a case. He had never heard of somebody who came aboard one of the test ships after the atomic tests being exposed to radiation. Subsequently, I sent this DAV representative a great deal of information about veterans. He then asked me if I had any material that could help him with the claim of a veteran who had been at Hiroshima. It was clear that I knew a lot more than he did about veterans exposed to ionizing radiation. He did not have the slightest

idea how to handle a radiation claim. I felt that I could have done a better job representing myself.

10. At my BVA hearing there was one medical member of the BVA on the panel. Her eyes were closed throughout the hearing and it appeared to me that she was asleep. At the end of the hearing the other members woke her up and asked her whether she had any questions. She said "no."

11. I have received no assistance from my local DAV representative. I had to prepare the whole case by myself. I have drafted all of the papers that were submitted to the V.A., including my appeal to the BVA. The DAV has done no research, either legal or factual. They have made no recommendations as to what I should put in the papers that I have filed. The DAV has never counseled me as to what I need to do or what I needed to take with me to the BVA. They have done nothing except forward to the VA the papers that I submitted. They have made no effort to obtain documents to support my claim.

12. The DAV clearly thinks that I am wasting their time. Every veteran with a radiation or Agent Orange claim whom I talk to feels that the DAV is just going through the motions. Each time I contact the DAV I talk to a different representative. I have talked to three or four different representatives on three or four occasions. Each time the conversation was only ten or fifteen minutes long at most. I would be much better off if I could retain an attorney to represent me.

13. The V.A. has not assisted me in developing the evidence to support my claim. Instead, I have been stonewalled by the government at every turn. The Defense Department does not answer my letters. I have made several Freedom of Information Act requests but I have never received a response. I finally got my service records from the V.A. but all of them are illegible. Curiously, my medical records for the period before and after my time on the U.S.S. Bowditch are clearly legible but my medical records from the Bowditch are illegible. I am having a very difficult time gathering medical evidence to prove that my diseases were caused by my exposure to radiation. Because of my exposure to radiation, I had a blood test taken by the gov-

ernment in 1947, but the V.A. told me that there are no records of it.

14. Because of my disabilities I have been unable to work for the last four years. I receive a monthly Social Security Disability check of \$465.00. My financial situation is, therefore, quite precarious. I have had to place a second mortgage on my home in order to pay the numerous medical expenses my personal health insurance does not cover.

15. I believe that if I were able to retain an attorney my claim for disability compensation would be better developed and would have a better chance of success.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10th, 1983 at Evergreen, Colorado.

/s/ _____
JOHN BURKE

**DECLARATION OF DON E. CORDRAY
(CAPTION OMITTED)**

I, Don E. Cordray, declare and state as follows:

1. I am a United States Navy veteran and one of the plaintiffs in this action. I live in Concord, California. I am fifty-five years old. I served in the United States Navy from 1945 to 1949 and from 1950 to 1966. I have personal knowledge of the facts hereinafter set forth, and, if called upon to do so, I could and would competently testify to them.

2. I enlisted in the United States Navy on October 2, 1945 and in 1946 I was assigned to the USS Fulton (AS-11) for duty at the Bikini Atoll, Marshall Islands, Pacific Ocean, during two atomic bomb test blasts known as Operation Crossroads. Both during and after these two atomic blasts, I was exposed to dangerous amounts of atomic radiation.

3. During atomic blast Able, on July 1, 1946 eighteen other men and I were positioned on the deck of the Fulton as "guinea pigs." We were the only unshielded persons on the ships. The ship was ordered to move into Bikini Lagoon immediately after Blast Able to give support to eight target vessels. These vessels were moved alongside the Fulton for two and one-half weeks.

At the detonation of Test Baker on July 25, 1946, the FULTON was 14 miles away. The FULTON remained outside of Bikini lagoon until July 30, when it anchored near the center of the lagoon.

The Fulton's logs indicate that in the four weeks following the blast the ship created over 600,000 gallons of fresh water by distilling highly radioactive sea water from Bikini lagoon.

Decontamination efforts in the months after Test Baker revealed that the saltwater and evaporators on ships in Bikini lagoon became highly contaminated with fission products. In addition, algae and other marine life on ship's hulls tended to concentrate these fission products, so that the hulls, particularly at the waterline, became dangerously radioactive. My main duty station was in close proximity to

the evaporator room, which was located on the Second Deck Belowships, at the waterline of the FULTON.

After blast Baker, the USS Fulton, with me aboard, towed the SS Skate, an extremely radioactive target vessel of Test Baker, to Pearl Harbor. We towed the Skate to Pearl Harbor at a speed of four knots and it took approximately thirty days.

The Fulton was highly contaminated with radiation during that time. At Pearl Harbor I was temporarily assigned to the ship's First Lieutenant's Department. My assignment to that department lasted for the duration of my remaining time aboard the FULTON. My duties consisted of conducting an extensive survey and inventory of all valves on the ship. As can be imagined, this inventory took many weeks. Each valve—of whatever type—had to be found, its exact location noted, the precise type of valve described, etc. This task involved each and every valve on the ship—including the evaporator room and salt water piping systems. As noted above, later studies revealed that these parts of the ship were highly contaminated. When the Fulton reached Mare Island in September of 1946, I was ordered to help decommission the ship. The ship was still hot from radiation, and it took months to decommission her. I was transferred from these duties in October 1946.

4. As a result of my exposure to radiation, I contracted and suffer from a very rare form of cancer, oat cell brochogenic carcinoma. It started in the right upper quadrant of my lungs and spread to my blood, then to my legs through the bone marrow. I have received chemotherapy treatment for this cancer. Also as a result of my exposure to radiation, I suffer from severe osteoarthritis of the spine, muscle weakness, severe pain in my lower back and hips, muscle aching and stiffness, severe headaches. In addition, injections I received after being contaminated by atomic fallout caused sciatic nerve damage. My cancer and my other disabilities prevent me from working. I currently have a 10% V.A. disability rating for a related condition.

5. While very sick with cancer and receiving regular doses of morphine to kill pain, and without the help of an attorney, I filed a Disability Compensation Claim with the

San Francisco Regional Office of the V.A. on February 7, 1977 for my oat cell carcinoma, arthritis of the spine and sciatic nerve damage. I had great difficulty representing myself and was unaware of what standards the V.A. uses to decide these cases. It was denied as not service-related. On June 21, 1977 I received a 10% disability rating from the San Francisco Regional Office of the V.A. for a related condition.

6. On September 23, 1977, while in the hospital with cancer and receiving morphine, and without an attorney, I filed with the Regional Office a Notice of Disagreement with my 10% disability rating.

7. On April 19, 1978, without an attorney, I filed an Appeal to the Board of Veterans Appeals.

8. On May 31, 1978, my accredited representative, the Veterans of Foreign Wars, filed a Statement of Accredited Representation in Appealed Case on my behalf with the V.A. This document was submitted as Exhibit A to the Complaint. It was handwritten and three sentences long. It purported to be an argument, but actually was only an extremely sketchy statement of what I "contended" and "believed." The service officer who wrote it acted like he did not even believe me.

9. Although, I did not know it at the time, I am informed that on September 14, 1978, a hearing was held before the Board of Veterans Appeals in Washington, D.C. I am informed that I was represented by Mr. Frank J. Clark of the Veterans of Foreign Wars. His presentation was extremely brief. No expert testified. The entire record of his argument takes up only one full page. It is attached hereto as Exhibit A and incorporated by this reference. On January 3, 1979 the rating decision against me was confirmed by the Board of Veterans Appeals.

10. On December 30, 1979, I filed another claim for service connection for my oat cell carcinoma. The San Francisco Regional Office of the V.A. denied service connection on August 13, 1980. I was not informed of this until October 30, 1980. I did not appeal the decision. I was extremely sick with cancer and had no one to help me, so I gave up. I wished that I could hire a lawyer to represent me but was prevented by the \$10 fee limitation from doing so.

11. On November 17, 1982 I filed again for service-connected compensation for my oat cell bronchogenic carcinoma with additional evidence, including the Log Book of the U.S.S. Fulton. The Veterans of Foreign Wars did not get this evidence for me; rather, it was obtained with the help of friends from the National Association of Atomic Veterans a non-profit group (not a service organization). On January 5, 1983, my claim was denied.

12. The various service organization representatives that have represented me have never attempted to obtain evidence such as exposure data or radiation studies to support my claim. In fact, they have never contacted me at any time. Service organization representatives appear to have no idea of what atomic veteran cases are all about and make no attempt to gather evidence to support atomic veteran claims. They are either unwilling or unable to take on the V.A. in an atomic veteran case.

13. The V.A. has opposed me at every turn. They have made no effort to help me reconstruct the true dose of radiation that I have received. I have felt helpless in trying to fight the V.A. by myself. Throughout my years of battles with the V.A. I have always wanted to have an attorney represent me but could not get a lawyer because of the \$10 fee limitation. I would gladly pay an attorney a reasonable amount to represent me. I am very frustrated that the V.A. prevents me from doing so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 14 day of July, 1983 at Concord, California.

/s/ _____
DON CORDRAY

EXHIBIT A
VETERANS ADMINISTRATION
BOARD OF VETERANS APPEALS
INFORMAL HEARING PRESENTATION

C 24 942 530

CORDRAY, Don E.

Hearing held in Board Room, BOARD OF VETERANS APPEALS, Veterans Administration, Washington, D.C., September 14, 1978.

Veteran represented by:

Mr. Frank J. Clark, Veterans of Foreign Wars of the United States

QUESTIONS AT ISSUE:

1. Entitlement to service connection for arthritis of the spine with sciatic nerve involvement.
2. Entitlement to an increased evaluation for service-connected duodenal ulcer.

MR. CLARK: Mr. Cordray is presently in receipt of a 10 per cent evaluation for the postoperative residuals, duodenal ulcer. He contends that the true degree of related symptoms has not been recognized by the regional office. In addition, he contends that he suffers from a chronic low back disorder with sciatic involvement which was either incurred in or aggravated by military service.

The originating agency noted the service clinical records of October 1947 regarding back complaints. The further noted that subsequent clinical records through date of retirement in July 1966 made no mention of a back disorder.

The initial claim for service connection was filed in February 1977. There is of record a report of an orthopedic consultation apparently dated December 11, 1971 and received by the originating agency in March 1977. Of particular importance is the historical information provided on the report. It is shown in part that Mr. Cordray had experienced lumbosacral back pain for the previous 10 years. This would have placed the date of onset well before retirement from active duty.

The aforementioned historical information was provided back in December 1971 or some five years prior to the date of the initial claim. Obviously, the history must be accepted

as fact since it would only have been provided for clinical purposes.

Regional postservice medical information dealing with the low back disorder was provided on a report received on March 28, 1977, and signed by Dr. Ralph D. Kirk. Yet further information is set forth on a report from Robert B. Jackson, D.O., received on July 25, 1977.

**SUPPLEMENTAL DECLARATION OF DON E. CORDRAY
(CAPTION OMITTED)**

I, Don E. Cordray, declare and state as follows:

1. I am a veteran of the United States Navy and one of the individual plaintiffs in the above entitled action. I know the facts recited herein of my own knowledge and if called upon could testify competently to them.

2. I was exposed to radiation during Operation Crossroads, a two blast atomic test series at Bikini Atoll in the Marshall Islands in 1946. Without the assistance of legal counsel, I filed V.A. service connected disability compensation claims for my radiation caused illnesses in 1977; 1979 and 1982. All of these claims were denied by the V.A. on grounds of lack of proof. I was represented before the V.A. by the Veterans of Foreign Wars.

3. After the Complaint was filed in the above-entitled action, Morrison & Foerster finally found a lawyer who would represent me for free. His name is Bruce Lymburn. At the time, he was an associate at the firm of Feldman, Waldman and Kline. He is presently associate general counsel with Grovenor Properties, Inc.

4. The representation that I have obtained from Mr. Lymburn has been far superior to the representation that I obtained from the Veterans of Foreign Wars, and to the representation that I was able to provide for myself.

5. The first thing that Mr. Lymburn did for me was to read the vast amounts of materials on Operation Crossroads and its radiation hazards. These materials consisted of about 1,000 pages of official documents, many of them technical in nature. These were mainly supplied to him by me. I had read some of these materials, but my lack of a technical background prevented me from knowing which of the materials were particularly relevant to my case. Mr. Lymburn's background aided him in his analysis of these materials.

6. In addition to analyzing the documentary evidence of Operation Crossroads, Mr. Lymburn familiarized himself with the rules of procedure and the standard of proof applicable to VA disability claim cases. He also collected consid-

erable amounts of medical literature on the health effects of ionizing radiation.

7. From the outset it was clear to Mr. Lymburn that the main issue in the case would be the amount of radiation I received. The Navy claims that I could not have received more than .24 rem gamma during Operation Crossroads. From the materials Mr. Lymburn read, he thought that the Navy's estimate was far too low.

8. Mr. Lymburn contacted Dr. Henry Vyner, a physician in Berkeley who works in the field of radiation and medicine, to get his opinion as to the best way to challenge the Navy's dose estimate. He suggested that Mr. Lymburn obtain a dose reconstruction for me, and he suggested several persons who might do the work. One of the persons Dr. Vyner suggested in turn referred Mr. Lymburn to Anthony Greenhouse, a health physicist who manages the Personnel Dosimetry Office of the Lawrence Berkeley Laboratory of the University of California at Berkeley.

9. Mr. Greenhouse agreed to conduct a retrospective dose assessment for me. To do so he needed to know (1) the levels of radioactivity documented on my ship, the U.S.S. FULTON (AS-11), or on other ships at Bikini whose circumstances were similar to the FULTON, and (2) the lengths of time I spent in proximity to known radioactive areas.

10. Since Mr. Lymburn was very familiar with the Crossroads documents he was able to provide Mr. Greenhouse with what he needed in the first area. In addition, Mr. Lymburn and Mr. Greenhouse collaborated on three Freedom of Information Act requests which revealed very important evidence. Mr. Lymburn spent considerable time with me talking about my activities aboard the FULTON. My memory was refreshed by examining three ship's blueprints for the FULTON Mr. Lymburn had obtained from the Navy.

11. From my descriptions of my activities aboard the FULTON, and the Crossroads evidence Mr. Lymburn obtained, Mr. Greenhouse prepared a dose reconstruction for me. Using very conservative assumptions and scientific techniques, Mr. Greenhouse calculated my radiation dose

during Operation Crossroads to be in excess of 10 rems. This is about 43 times the Navy's estimate, and more than twice the maximum annual radiation dose permitted under modern radiation dose standards in effect in the United States today. In addition, my reconstructed dose is far greater than the doses documented in successful appeals to the Board of Veterans Appeals.

12. Mr. Greenhouse's dose reconstruction forms the foundation for my appeal. Mr. Lymburn is currently in the process of writing the brief in my case, and he should be finished in the next few weeks. He expects to have a hearing before the VA in my case by late this year or early next year.

13. I am very glad that I finally have an attorney to represent me. For years I was unable to find a lawyer to help me because of the \$10 fee limitation. Very few lawyers are willing to provide their services for free.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 day of November, 1983.

/s/

DON E. CORDRAY

AFFIDAVIT OF HOWARD J. DE NIKE **(CAPTION OMITTED)**

I, HOWARD J. DE NIKE, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. My practice has centered for the past fifteen years upon representing persons with military law problems. These cases cover virtually every possible military law forum, including general and special courts-martial, the United States Court of Military Appeals, the Army and Navy Courts of Review, the United States Court of Claims, the Board for Correction of Naval Records, the Army and Air Force Boards for Correction of Military Records, the Army, Navy and Air Force Discharge Review Boards, and the federal court system from district court to the United States Supreme Court.

2. I have written numerous articles on the subject of military law for publication, including, "The New 'Problem Soldier'—Dissenter in the Ranks," Indiana Law Journal, Vol. 49, p. 685 (1974), which described my experience during two years of employment with the Lawyers Military Defense Committee which were spent in Vietnam, the Philippines and the Republic of Germany.

3. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. §§ 3404-3405, and the nature of the plaintiff's claims in this action.

4. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

5. Because of my well-known specialization in military law and my Yellow Pages listing under that heading, I frequently receive inquiries from prospective clients seeking assistance on Veterans Administration claims. I would estimate the number of such inquiries as from two to three per week. Invariably, I must turn these requests for representation down despite 1) apparent merit of the claim, 2) a strong plea from the claimant to accept the case with an ability to pay a reasonable retainer, 3) and my own belief in my qualification to handle the case.

6. The reason for declining to accept such cases described above is the provisions of 38 U.S.C. §§ 3304-5. When I decline to accept such cases, I try to refer the claimant to an agency. This is because the process of submitting an initial claim or appealing a denial can involve complex issues and forms which are commonly beyond the capabilities of the average layperson.

7. In many cases where I refer an individual to an agency which can handle VA claims free-of-charge, I learn that the individual has previously sought assistance from the same agency and is either dissatisfied or not eligible for some reason. The expressions of dissatisfaction usually mention inadequate contact with agency representatives, leading to lack of preparation and a perceived absence of zeal on the part of agency personnel in advocating the client's interests.

8. Often, the claims of veterans are subject to being addressed in more than one forum, such as the Veterans Administration and the Board for Correction of Military/Naval Records. In such instances, I will take the matter before the non-VA Board, but I must decline to represent my client before the VA despite the obvious advantages in doing so. My reason for this is to steer as wide as possible away from the prohibitions of 38 U.S.C. §§ 3304-5. I do not want to be in an ambiguous position where my fee could be characterized as being received for representation of the veteran before the VA.

9. In numerous instances over the years, I have had occasion to seek records from the VA to assist my representation of a client before a forum other than the VA. The difficulties I have encountered in accomplishing even such a simple task, lead me to conclude that virtually anyone who must deal with the VA would be substantially benefitted in having a representative who is thoroughly versed in VA bureaucracy and procedures.

10. In my experience, there is no reason to believe that granting private attorneys access to appear on behalf of clients before the Veterans Administration would result in any more overreaching or unscrupulous practices than 1) presently exist among those laypersons who presently

"counsel" claimants outside recognized agencies, or 2) exists among attorneys in general in their handling of other types of cases. Granting access could well curtail the former source of unscrupulous practices since the client is assured a greater measure of ethical conduct through the enforcement mechanisms of the State Bar.

/s/

HOWARD J. DE NIKE

Subscribed and sworn to
before me this 28th
day of April, 1983.

NOTARY PUBLIC
in and for the State of California

**DECLARATION OF GLENN DORFMEIER
(CAPTION OMITTED)**

I, Glenn Dorfmeier, declare and state as follows:

1. I was a participant at Operation Sandstone at Eniwetok Island in 1948, which included atomic test Shot X-Ray on April 14, 1948.

2. Shot X-Ray and the other Operation Sandstone blasts caused contamination of the groundwater at Eniwetok Island, which I and the other crew members used for drinking and bathing. Specifically, the groundwater reservoir was contaminated by radionuclides of iodine washed away from drone planes.

3. Radiation affects the biological function of the thyroid. As a result of my exposure to radiation at Operation Sandstone, I suffer from hyperthyroidism and thyroid dysfunction.

4. On December 22, 1978 I filed a claim for V.A. Disability Compensation with the Northern California office of the V.A. On July 31, 1979, my claim was denied.

5. On July 8, 1981, I had an oral hearing before the Board of Veterans Appeals in Washington, D.C. The Board remanded my claim for thyroid dysfunction evaluation.

6. The V.A. has adamantly denied my claim of service-based disability, despite convincing evidence of service connection.

7. The V.A. did not attempt to obtain evidence to support my claim but relied on a report of the Defense Nuclear Agency which stated that there were no records of radiation levels of drone planes. This was refuted by information I obtained under the Freedom of Information Act. This information was only obtained after the intercedence of Congressman Tony Coelho.

8. The V.A. also relied upon the Defense Nuclear Agency's claims that thousands of rems of radiation exposure is necessary to cause undue abnormal physiologic function in the thyroid, and that there is no such thing as a latent effect in the development of radiation induced thyroid abnormalities. I, a sick and disabled veteran, managed to discover the thyroid research work done on the Marshall Islands by Conrad's group at Brookhaven National Laboratory and the research that Dr. Greenspan of the Depart-

ment of Medicine at the University of California at San Francisco published in the same field, disproving these claims. The V.A. repeatedly refused my requests for evaluation of my condition by Dr. Greenspan, who was the consulting endocrinologist during my hospitalization from November 7, 1978 to November 16, 1978, the record on which my claim is based.

9. Based on my experience I suspect that any medical evaluation that would give credibility or support to the claim of an atomic veteran is ignored or suppressed by the V.A.

10. The Board of Veteran Appeals ordered the V.A. to arrange for me to be examined by an endocrinologist. The V.A. refused my request to have Dr. Greenspan perform the evaluation. Instead, the evaluation was performed by Dr. Jeffrey S. Mason. My historical medical records were not forwarded to Dr. Mason by the V.A., despite the direct instructions of the Board of Veterans Appeals to do so. Still, the conclusion of Dr. Mason's evaluation was not unfavorable to me. It was, however, omitted from Supplemental Statement of the Case prepared by the V.A. I was able to determine this only after making a Freedom of Information Act request for Dr. Mason's evaluation.

11. My experience representing myself before the V.A. and especially before the Board of Veteran Appeals, has been very frustrating. Far from assisting me, the V.A. has hindered my attempts to obtain and present evidence in support of my claim. The Board of Veterans Appeals refused even to tell me what evidence I needed to prevail on my appeal. I cannot believe that the V.A. calls its adjudication system "non-adversarial." The V.A.'s attitude toward me has been very adversarial through the entire adjudication process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of July, 1983 at Fresno, California.

/s/

GLENN DORFMEIER

**DECLARATION OF CHARLES E. JOECKEL, JR.
(CAPTION OMITTED)**

I, Charles E. Joeckel, Jr., declare and state as follows:

1. I am the National Director of Services for the Disabled American Veterans (DAV), a nonprofit, national, veterans service organization chartered by Congress in 1932 with a present membership of more than three quarters of a million wartime disabled veterans. Nearly 30% of the DAV's membership is made up of disabled veterans of the Vietnam War period.

2. The DAV has many programs designed to accomplish its goals of assisting disabled veterans in their struggles to regain their health, reshape their lives to cope with their disabilities, learn new trades or professions, and rejoin the civilian world as fully productive citizens. Among our major programs is the National Legislative Program through which DAV promotes reasonable, responsible legislation to assist all disabled veterans, their families, and their survivors. The DAV's National Employment Program, in addition to filing hundreds of job discrimination complaints on behalf of disabled veterans, works closely with the National Alliance of Business, the President's Committee on Employment of the Handicapped, and other public and private organizations to make equal employment opportunity a reality for all disabled veterans. The DAV's Vietnam Veterans Outreach Program has assisted over 150,000 veterans, who needed a hand in coping with the harsh effects of the Vietnam War.

3. One of DAV's most important programs is its National Service Program. In this program, the DAV assists disabled veterans and their families in obtaining disability compensation, death benefits, pension, and other benefits provided not only under laws administered by the Veterans Administration, but under other Federal, state, or local laws as well.

4. The services provided under this program include much more than simply counseling veterans and their families concerning benefits. DAV National Service Officers

(NSOs) assist in filing claims, prepare briefs, assemble evidence in support of claims and appear on a claimant's behalf at oral hearings. In short, NSOs provide all the services necessary to fully represent a claimant at all administrative stages of the benefit claims process.

5. DAV employs 251 NSOs on a full-time basis. All NSOs are accredited by the Veterans Administration to represent claimants and more than 95% of them are seriously disabled veterans of the Vietnam War. Veterans need not be members of the DAV to take advantage of the free services provided by the NSOs.

6. NSOs are assigned to each of the Veterans Administration Regional Offices throughout the United States and Puerto Rico. In addition, NSOs are assigned on a permanent basis at six Veterans Administration Contact Offices and four Medical Centers. Our Appeals Staff consists of 10 National Appeals Officers assigned to the Board of Veterans Appeals.

7. The vast majority of NSOs received on-the-job training under the auspices of 38 U.S.C., Chapter 31, the Veterans Administration Vocational Rehabilitation Program. The duration of this training, as well as related classroom instruction, is 16 months. A general description of the DAV's formal training regime is attached. The training is provided by the office's Supervisor with direct input from other staff members where appropriate.

8. As noted in the attached training description, during the formal training period instruction is given covering all aspects of Veterans Administration benefit programs, including but not limited to, compensation and pension; vocational rehabilitation; medical care; education; insurance; home and small business loans; death benefits; job counseling; employment and reemployment rights; and related general benefits. NSO trainees are introduced to the various laws and regulations governing Veterans Administration benefits and entitlements as well as the procedures used in adjudicating claims. In addition, they become familiar with, and use on a daily basis, the various manuals, program guides, and circulars published by the Veterans

Administration for use in the administration of the various benefit programs.

9. Although the formal training period is 16 months, NSO training and education continue thereafter. DAV National Service and Legislative Headquarters periodically conducts intensive training seminars for our NSOs.

10. NSOs have a great variety of resources available to assist them in providing expert representation to claimants. For example, NSOs have access to Veterans Administration libraries and resources, such as Administrator's Decisions and Opinions of the General Counsel as well as the publications listed in paragraph 8. They also have access to medical consultants as well as their associates for opinions and assistance in individual cases. At the appellate level, our Appeals staff has direct and easy access to the Veterans Administration Central Office libraries, including the law library and the BVA library. Another extremely valuable and often used resource is the Appeals Index Retrieval System we have obtained for our Appeals office. This system contains, on microfiche, all Board of Veterans Appeals decisions rendered since mid-1977 and enables a National Appeals Officer to quickly and thoroughly research specific issues that may arise in a particular case. DAV also employs, on a part-time basis, a board qualified physician in internal medicine on our Appeals Staff. This physician serves as a consultant to provide expert medical opinions in appropriate cases.

11. Two other attributes of the representation provided by DAV are worthy of mention. First, all DAV NSOs are wartime disabled veterans with service-connected, wartime disabilities. Like the clients they represent, they have had to learn to face the handicaps that overshadowed their futures. Thus, they are able to relate to and understand the plight of the claimants they serve, not on the level of a cold business relationship, but on the personal level of individuals who have shared similar, painful and tragic experiences. Second, NSOs develop a certain rapport with Veterans Administration Employees due to their everyday contact and their common goal of assisting veterans, and their families and survivors. Obviously, it is difficult to estimate the ex-

act value of this rapport, but its beneficial nature should not be overlooked.

12. While DAV NSOs are responsible for handling thousands of benefit claims every year, some of these are routine requiring minimum effort other than assisting a claimant in filing his or her claim. In most cases, the Veterans Administration itself obtains the records or evidence necessary to adjudicate the claim. Obviously, it is the non-routine cases, particularly at the appellate level, which require the greatest effort from any claimant's representative.

13. Available VA statistics provide some insight into the relative merits of DAV representation as compared to that provided by attorneys at least at the appellate level. In Fiscal Year 1982, the DAV provided representation in 40% of all cases decided by the Board of Veterans Appeals. During that same period attorney/agent representation accounted for only 2.4% of the appeals disposed. For Fiscal Year 1979 through 1982, the average allowance rate in cases in which DAV was designated representative was 13.3%. The average allowance rate for attorneys/agents was 13.2%. During this same period, remand decisions in DAV represented cases averaged 14.7% and in attorney/agent cases, 15.35%. The average allowance rate for DAV and attorneys/agents at the appellate level in Fiscal Year 1972 through 1982 is almost parallel with DAV showing a slightly higher percentage for the last four Fiscal Years.

14. I personally believe that two inferences can be drawn from this data. First, DAV representation is better than that provided by attorneys and agents. Second, the higher remand rate for attorneys and agents indicates their preparation of appellate cases, particularly in regard to accumulating evidence to substantiate a claim is more likely to be inadequate than that done by DAV representatives. These conclusions are clear and compelling, particularly, in view of the fact that attorneys are in the enviable position of having the freedom to select those cases in which they wish to represent a claimant within the Veterans Administration system. It is clear that attorneys may only choose to accept cases in which, in their judgment, a favorable decision will ensue since they have the freedom to decline a claimant's request for representation.

Unlike attorneys and agents, DAV represents each and every claimant who requests representation, regardless of whether the claimant is a DAV member and regardless of the strength or weakness of the merits of the case.

15. DAV's involvement in complex cases such as those involving radiation exposure and post-traumatic stress disorder, both at the Regional Office level and at the Board of Veterans Appeals, has been extensive over the years. Although no statistical data is separately maintained for such cases, I am sure that claimants represented by DAV have enjoyed a degree of success at least equal to that experienced by claimants represented by other service organizations, attorneys or agents. An example of DAV's concern with respect to the issues raised in complex cases is illustrated by the fact that DAV initiated and funded the research and studies that led to recognition of post-traumatic stress disorder by the medical community at large which included the condition in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* and by the Veterans Administration as a ratable entity for disability compensation.

16. In conclusion, I would only reiterate that DAV NSO are extensively trained professionals who have both the ability and the resources necessary to provide expert representation for Veterans Administration benefit claimants in all cases, including those involving the most complex issues. And, I would add that in my experience, the only criticism leveled at these dedicated individuals comes from a relatively few claimants who are obviously disgruntled by the denial of their claims and attorneys whose self-interest is equally obvious and that the knowledge of an experience in the area of veterans affairs of both is extremely limited.

17. I declare and state under penalty of perjury that the information set forth herein is true and correct, to the best of my knowledge and believe.

/s/ Charles E. Joeckel, Jr.

CHARLES E. JOECKEL, JR.
National Director of Services
Disabled American Veterans

Executed on NOVEMBER 16, 1983

July 19, 1977

M22-1, Part I
APPENDIX G
Change 2

ON-THE-JOB TRAINING PROGRAM FOR NATIONAL SERVICE OFFICERS, DISABLED AMERICAN VETERANS

SECTION I. THE PROGRAM

A. JOB DESCRIPTION: Advises and assists veterans or their dependents in presenting claims for disability compensation, death or injury insurance, [education and rehabilitation,] and other claims for benefits to which they may be entitled under Federal, State or local laws; evaluates validity of claim by reviewing legislation, regulations and precedents, and by studying veterans' medical report and service history. Obtains claimants' power of attorney. Prepares claim forms and briefs, and assembles pertinent evidence. Requests hearing before proper Government board, and orally presents brief. Reviews board decision to decide whether appeal is warranted. Advises veteran on programs and services for which he may be eligible, working in cooperation with the Veterans Administration and other Government agencies. Acquaints field representatives with current activities and legislation by preparing bulletins and initiating correspondence. Participates in, or initiates civil functions, such as panel discussions and radio programs to acquaint public with services rendered and rights and benefits of veterans and dependents. May offer technical advice at congressional or other governmental hearings.

B. HOURS OF WORK: 8 hours per day; 40 hours per week.

C. LENGTH OF TRAINING PROGRAM: The training program will generally not exceed 25 months, of which 16 months will be on-the-job training and up to 9 months or two semesters of academic instruction depending upon the needs of the veteran.

D. TRAINEE WAGE SCALE [AND SUBSISTENCE ALLOWANCE]:

Period	Monthly Wage	Monthly Subsistence Allowance			
		W/O Dep	1 Dep	2 Dep	Add'l Dep
1st 4 months	\$625	\$197	\$238	\$275	\$292
2d 4 months	675	197	238	242	242
3d 4 months	725	192	192	192	192
4th 4 months	775	142	142	142	142

The journeyman wage is \$917 per month.

E. ON-THE-JOB TRAINING PROGRAM, NATIONAL SERVICE OFFICER

	Estimated Hours
I. Orientation in VA Regional Office	40
Office procedure — Layout — Personnel, etc.	
II. Work in Compensation Areas	1290
Claims — Aggravation — Presumptive — Rates, etc.	
III. Work in Pension Areas	400
Applications — Old and New Pension Law — Aid and Attendance — Medication — Income, etc.	
IV. Special Service Connected Benefits	150
Automobile — Housing — Prosthetics — Hospital Rating — CSC Preference — Blind, etc.	
V. Medical — Hospital Care — Outpatient	200
Entitlement — Priorities — Domiciliary — Nursing Home — Reimbursement, etc.	
VI. Education	170
Vocational Rehabilitation — [Dependents] [GI bill]	
VII. Life Insurance	100
Government — Servicemen's Group	
VIII. Death Compensation	137
Before January 1, 1957 — DIC After January 1, 1957 — NSC Death Pension — Gratuity — Burial, etc.	
IX. GI Loans	80
Dates — Financing — Interest — FHA Insured Loans, etc.	
X. Chapter Work	100
Organization — Drives — Speaking, etc.	
TOTAL AMOUNT	2,667

F. RELATED INSTRUCTION:

Academic instruction will be provided as needed by the individual. Determination of courses to be taken will be based upon findings in counseling and in consultation with the vocational rehabilitation specialist and National Service Officer. It is not expected that such training will require more than two semesters or 9 months if training is taken in post-secondary courses. Instruction may be provided in colleges, below college level institutions, or individual instruction, as appropriate.

Academic instruction [may be pursued] before induction into on-the-job training, [] concurrently with on-the-job training, [or partly on one basis and partly on the other. Factors which will enter into determining how academic courses are to be scheduled are whether the veteran has the basic academic skills needed to perform the tasks required of a trainee and whether the total amount of academic work that the veteran needs exceeds that which can reasonably be pursued concurrently with on-the-job training. Such concurrent training generally should not exceed more than two courses per term.

In determining whether academic work pursued concurrently with on-the-job training should be scheduled during the day or after work, careful consideration must be given to such factors as severity of the veteran's disability, his or her previous academic record, and whether the needed courses are available in other-than-work hours. Courses which have been found most helpful are those which enhance communication skills, particularly letter and report writing and interviewing, and which aid in understanding physical and emotional disability.]

Text books which may be authorized for National Service Officer Trainees are:

Beeson, Paul B. and McDermott, Walsh, eds. *Cecil-Loeb Book of Medicine*, 14th ed. Philadelphia: W.B. Saunders Co., 1975.

Department of Medicine and Surgery. *Physicians' Guide: Disability Evaluation Examination*. Washington, DC Veterans Administration, 1976.

Diagnostic and Statistical Manual—Mental Disorders, 2d ed. Washington, DC: American Psychiatric Association, 1968.

Dorland, William A.N., *Dorland's Illustrated Medical Dictionary*, 25th ed. Philadelphia: W.B. Saunders Co., 1974.

Holvery, D.N. and Talbott, J.H., *The Merck Manual of Diagnosis and Therapy*, 12th ed. Rockway, New Jersey.

Anthony, C.P. and Kolthoff, N., *Textbook of Anatomy and Physiology*, 9th ed. St. Louis: C.V. Mosby Co.

Pansky, B., *Review of Gross Anatomy*, 3d ed. Riverside, NJ: MacMillan Publishing Co.

Code of Federal Regulations 38, Pensions, Bonuses and Veterans Relief. Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20420.

[The books on this list should generally meet National Service Officer trainee needs for reference material during the period of training. If additional books are requested, approval may be granted if the requested item(s) do not duplicate books on the approved list and are necessary in the trainee's individualized program.]

These books are generally available in university bookstores. When the specific edition listed is not available, another edition of the same book may be used. With the assistance of the VRS, the NSO will prepare VA Form 22-1905m, Request for Training Supplies, listing books needed for training. It is essential that necessary books be secured in timely fashion. If the veteran is attending a college for related instruction, he or she may order the books approved on VA Form 22-1905m at the college bookstore in the same manner as for the courses he or she is taking. If the books are not available, arrangement should be made with another university bookstore to issue the books to the veteran. In the unusual instance in which these books are not available at the bookstore with which agreements are in effect, an agreement will be negotiated with a bookstore carrying such technical books, or other books carrying necessary information may be authorized.

G. LEAVE POLICY. For the first year both annual and sick leave are accrued at the rate of 4 hours per month. For the second year both annual and sick leave will accrue at the rate of 8 hours per month. However, for the first 90 days any absence will be without pay. Holidays with pay will be only those recognized by the Federal Government.

H. FRINGE BENEFITS:

1. Insurance: Group Life, Blue Cross and Blue Shield, [and Delta Dental Plan] are provided after 6 months' continuous employment.

2. Retirement: Provided to full-time employees under age 64 with at least 1 year of continuous employment.

I. OTHER ADMINISTRATIVE POLICIES: With few exceptions, the place of training and subsequent employment will be the same. Transfer will be made by joint decision of appropriate VA and DAV personnel. In these cases, the veteran's transportation will be authorized by the VA in accordance with VA Regulations 10266 and 10267. DAV will pay the cost of transportation for the veteran's dependents as necessary. Prior to completion of training, a 2-day orientation program will be conducted at DAV National Headquarters, Cold Spring, Kentucky, with the veteran's transportation to be borne by the Veterans Administration in accordance with existing regulations. [Payment of travel to other DAV meetings, such as conventions, may not be approved.]

J. VA Form 22-1904, Agreement to Train On-the-Job Disabled Veterans, will be executed in each case in which a veteran is entered into NSO training under this program.

**DECLARATION OF R. CHARLES JOHNSON
(CAPTION OMITTED)**

R. CHARLES JOHNSON, first being duly sworn, hereby states and declares as follows:

1. I am an attorney duly licensed to practice law in the State of California, and have been so licensed since 1978. My practice includes a large number of active duty military and veteran clients, and I have considerable experience in veteran's matters. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 USC §§ 3404-3405 and the nature of plaintiffs' claims in this action.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

3. As a certified law student I worked with the veterans' organization, Swords to Plowshares, in San Francisco, California. During my employment with that organization I familiarized myself with the claims process of the Veterans' Administration and represented veterans at various stages of that process. I quickly learned that the Veterans' Administration is a complex bureaucracy with its own set of statutes, rules and regulations. In many cases it was my experience that the complexity of issues presented by a veteran's claim, coupled with the procedural hurdles, are far beyond the comprehension or ability of most veterans.

4. Many of the claims being adjudicated by the Veterans' Administration today, such as claims involving atomic radiation, Agent Orange, and Post-Traumatic Stress Syndrome, involve more legal and procedural complexities than do many judicially litigated matters. In my experience working with dozens, if not hundreds, of veterans, I find that issues such as causation, burden of proof, administrative presumptions, and statutory time limits render many veterans incapable of adequately presenting a claim to the Veterans' Administration. Likewise, most veterans with whom I have had contact are either unaware of, or lack the expertise to utilize, their rights to present witnesses, present documentary evidence, present their case at a hearing,

exercise appellate rights, and exhaust administrative remedies.

5. Some organizations, such as the American Legion, Veterans of Foreign Wars, and so on, provide lay representatives to assist veterans in presenting claims to the Veterans' Administration, military discharge review boards, and other agencies. In most cases, however, my experience has been that those representatives are inadequate. I have reviewed numerous cases in which potentially strong issues were not raised by the veteran (and in many cases were therefore forfeited) because his or her service organization representative either failed to spot the issue or simply did not understand that it was an issue. It is normal policy with many of these lay representatives from service organizations to not even review the veteran's case until the day of a hearing. In the main, those organizations simply lack the training, expertise and resources to do a proper job. The only exception to that which I have encountered in my thirteen years in this field is Swords to Plowshares, where veterans' representatives are given extensive training and are supervised by one or more attorneys and in many cases are themselves attorneys or law students.

6. Because of the fee limitation imposed under 38 U.S.C. §§ 3404-3405, neither I nor most other private practitioners are willing to accept a Veterans' Administration matter. I have personally declined to represent dozens of veterans who have consulted me regarding a Veterans' Administration claim solely because of the fee limitation situation. Ten dollars, the maximum fee allowable under the subject statutes, is rarely sufficient to cover an attorney's out-of-pocket costs such as parking fees, postage, photocopy costs, and so on; it clearly can not cover an attorney's ongoing overhead costs for time spent on such a case. Because of my reputation as an attorney with considerable expertise in military law matters I am often contacted by other attorneys confronted with a military or veteran's issue. Invariably fellow attorneys, when advised of the provisions of 38 USC §§ 3404-3405, respond that under that cir-

cumstance they are economically precluded from assisting the veteran, and so must decline the case.

7. Any contention that the Veterans' Administration claims process is non-adversarial, and that therefore representation by experienced lawyer counsel is unnecessary, ignores reality. In actual fact, the mood of a Veterans' Administration claim process is that the claim will be denied until and unless the veteran convinces the agency otherwise. The veteran claimant carries the burden of proving his or her claim, is generally unable to discover or obtain government documents, has no power to subpoena witnesses, and has no recourse to judicial review even in the grossest cases of abused discretion. In essence, the Veterans' Administration acts as both the opponent and the judge, a clear conflict of interest. Moreover, the decision of the "judge" in a Veterans' Administration case, unlike that of an Administrative Law Judge, is not subject to review in a real judicial forum.

8. In essence, the Veterans' Administration claims process is exceedingly complex. Without the assistance of an experienced attorney, most veterans find themselves ineffectual in the face of the bureaucracy. Because of the fee limitations set forth in 38 USC §§ 3404-3405, the overwhelming majority of attorneys who might otherwise represent the interests of our veterans are economically forced to decline such cases, or to take them very sparingly on what essentially amounts to a *pro bono* basis.

9. I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on March 29, 1983, at 404 San Anselmo Avenue, San Anselmo, California.

/s/ R. Charles Johnson
R. CHARLES JOHNSON

DECLARATION OF FREDERICO JUARBE, JR. (CAPTION OMITTED)

I, Frederico Juarbe, Jr., declare and state as follows:

1. I am the Director of the National Veterans Service (NVS) of the Veterans of Foreign Wars of the United States (VFW). The VFW is a national veterans service organization chartered by Congress in 1936 with a present membership of more than 1.9 million veterans.

2. Since its inception in 1899, the VFW has pledged to "Assist Worthy Comrades, their Widows and Children." To achieve this goal, a service program was formed to provide free representation to assist individuals seeking benefits under laws administered by the Veterans Administration (VA). This program is administered by the National Veterans Service in accordance with the VFW's Constitution and By-laws. The NVS is composed of a network of dedicated personnel at the Post, Department and National levels who are current or former members of United States Armed Forces.

3. The VFW's By-laws require each Post to have a Service Officer. There are approximately 10,000 Post Service Officers who have volunteered to serve the needs of VA claimants at the local level. Under the supervision of their respective Department Service Officer, they advise Post members concerning the VA benefit system and assist veterans, their dependents and survivors in preparing claims and obtaining evidence to support them. Although not regarded as a fully skilled technician, Post Service Officers are provided training in form preparation and evidentiary development through attendance at regional and departmental schools conducted by Department Service Officers. Additional information is available to them in the *Guide for Service Officers*, a handbook on veterans benefits published by NVS. One of the principal functions of Post Service Officers is to act as liaison between the claimant and the Department Service Officer who is located at a VA Regional Office.

4. There are 137 VFW Department Service Officers located in 57 VA facilities throughout the United States. They are salaried employees and their responsibilities are primarily directed toward assisting claimants in preparing, presenting, and prosecuting claims for VA benefits. They also provide assistance with respect to benefits available from other Federal, state and local agencies.

5. The VFW's training program for Department Service Officers is structured, and although guided by NVS, is decentralized due to geographic and resource constraints. The program ranges from highly sophisticated formats requiring college level courses such as that of the Department of Michigan to less formal on-the-job systems utilized in a number of departments. In these latter systems, much of the training is provided by the incumbent Service Officer complemented by NVS Field Representatives who monitor progress and provide follow-up instruction and guidance. Technical training sessions given by the VA for its own staff are open to VFW Department Service Officers and serve as valuable sources of training. Department Service Officers meet semi-annually with NVS staff as part of their continuing training. Periodically, regional seminars on specific subjects such as VA insurance programs are sponsored by the VA and are open to VFW representatives.

6. In addition to Post and Department Service Officers, the VFW has obtained VA accreditation for 454 representatives who have undergone various levels of training.

7. At the national level, the VFW has a staff of 19 professionals who provide technical and administrative assistance to Department Service Officers as well as presenting individual cases before the VA and other government agencies. The majority of this staff are former Department Service Officers and possess the expertise to function in an advisory capacity to the VFW's network of accredited representatives and to effectively argue cases before the Board of Veterans Appeals, the VA's Compensation and Pension Service, or the military correction and discharge review boards. Those members without prior experience in the veterans benefit system are trained in all appropriate phases of law and regulations, the VA rating schedule,

medical nomenclature and etiological relationships under the auspices of experienced personnel.

8. Although each national staff member attains a high degree of proficiency in VA procedures and related subjects, individuals are also selected to develop additional expertise on complex issues such as herbicide and radiation exposure and post-traumatic stress disorders. Such specialized training allows them to function as staff coordinators and to assist other Service Officers in these areas. Training in these specialties is accomplished through extensive research, attendance at conferences, and participation on VA and other advisory panels. Additional training is available through attendance at numerous seminars sponsored by various other government agencies. Finally, emphasis at all levels of representation is placed on self-enrichment outside the formalized program to enhance a representative's knowledge and skills.

9. VFW representatives have a wide range of resources available to assist them in representing claimants before the VA. Post Service Officers who play a valuable initial role in representation are provided the Service Officer's handbook containing a step-by-step approach to veterans benefits. They also receive the VFW Magazine and departmental newspapers and a monthly publication from the Washington Office which contain current information on veteran programs. Their most valuable resource, however, is their accessibility to the Department Service Officer.

10. At the Departmental level, Service Officers are routinely furnished VA laws, regulations, and other publications including changes and amendments. In addition they are provided technical bulletins published by NVS. Department Service Officers maintain their own libraries which include these materials as well as medical information and regional office and appellate decisions acquired in the prosecution of individual cases. VA libraries containing medical and legal material as well as data processing system archives are also available, including the extensive libraries at VA medical facilities. Department Service Officers have the opportunity to consult with the VA personnel at the Regional Offices and with NVS staff members.

11. At the national level, the VFW's Washington Office has accumulated a wealth of technical resource material spanning the broad spectrum of veterans programs. The NVS staff is routinely provided VA laws, regulations and related materials along with technical information from other governmental agencies and has access to the libraries of both the Board of Veterans Appeals (including its microfiche archives of decisions) and the Veterans Administration Central Office.

12. The VFW has attained a formidable success record in its prosecution of VA claims. During the period between May 1981 to August 1983, VFW Department Service Officers collectively processed 335,996 claims covering all benefits administered by the VA. During the same period, 301,619 cases were favorably resolved. Concurrently at the appellate level, the VFW participated in 9,549 cases in which a Board of Veterans Appeals decision was rendered. Of these appeals, 1,240 were allowed and 1,733 were remanded to Regional Offices for further development. Of the remanded cases, 325 were allowed at the Regional Office level without further appellate action. In addition, the VFW presented 121 cases to the VA's Compensation and Pension Service for administrative review. Of these cases, 39 were allowed and 15 were referred to the originating VA office for further action. Although I believe these statistics are impressive by themselves, they become even more so when considering that the VFW will not refuse representation except for compelling reasons.

13. The VFW is deservedly proud of its long tradition of effective representation of veterans, their dependents and survivors in their quest for benefits through the non-adversary VA claim process. The VFW's nationwide service network assures claimants unburdened accessibility to free, expert representation. And, the co-location of VFW Service Officers with VA staff has allowed the development of an atmosphere of cooperation and understanding that clearly enhances the achievement of their common goal of providing every eligible VA claimant with every benefit authorized by law.

14. I declare and state under penalty of perjury that the information set forth herein is true and correct, to the best of my knowledge and belief.

/s/ Frederico Juarbe, Jr.
 FREDERICO JUARBE, JR.
 Director, National Veterans Service
 Veterans of Foreign Wars of the
 United States

Executed on NOVEMBER 17, 1983

**DECLARATION OF THOMAS McBEE
(CAPTION OMITTED)**

I, Thomas McBee, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Air Force and a member of the National Association of Radiation Survivors. I am also a member of the National Association of Atomic Veterans, to which I was elected Missouri State Chairman in late October, 1983. I currently live at 703 Clark Road in Blue Springs, Missouri, 64015. I entered the Air Force in 1951, re-enlisted in 1955 and retired in 1959 as a buck sergeant. I served in active duty during the Korean conflict.

2. I know the facts recited herein of my own knowledge and if called upon could competently testify thereto.

3. I was ordered to the Eniwetok Atoll of the Marshall Island in February, 1956. I was a special equipment mechanic at the time and was told that I was being sent to the Eniwetok Atoll in that capacity. In fact, the Air Force used me to decontaminate airplanes immediately after each of the seventeen atomic blasts of atomic test Operation Redwing in April to July of 1956. The aircraft I was ordered to decontaminate were used directly in each of the blasts. Consequently, I was exposed to a great deal of ionizing radiation. In addition, after the next to the last blast, there was a lot of fallout in the main island where I was stationed.

4. Before I left the Eniwetok Atoll, I began to experience severe pain in the bones and muscles of my legs. The military doctors claimed it was arthritis. I was 24 years old. When I boarded the plane to leave the Eniwetok Atoll I had to walk with a cane.

5. Over the years I have been constantly plagued by pain in my legs and back. I would estimate that I have been hospitalized thirty times for the pain in the bones and muscles in my legs and back. The muscles and bones in my back and legs are deteriorating. The pain is always there. Not even morphine can stop the terrible pain in my legs. In addition,

I have problems with my blood, including anemia. I also suffer from bleeding ulcers.

6. In February 1980 I woke up coughing blood and was hospitalized for ten days with blood clots in my lungs. Since then I have again had blood clots in my lungs on two occasions.

7. I have four children. Becky, the oldest, was born before I was exposed to radiation and is perfectly healthy. Edward, Cheryl and Susan were born in 1960, 1965 and 1970, respectively. Edward has serious problems with his kidneys. Cheryl is very small in stature and has respiratory problems. Susan has a cavity in her kidneys and is always getting kidney infections.

8. I have filed disability claims with the V.A. five or six times. Each time the claim has been denied. (I have a 10% disability rating for ulcers because this condition appeared while I was still in the service.) The V.A. admits that I am 100% disabled, but claims that my disabilities are not service connected. The V.A. also claims that all of my medical records and service records were destroyed in a fire. Yet, every time that the V.A. denied my claims they cited to my medical records and service records. To this day, the V.A. has not provided me with my medical records nor my service records.

9. The V.A. sent me several notices telling me that I could waive my right to a hearing. I did have one personal hearing at St. Louis. The V.A. told me to keep my mouth shut about the atomic tests because that information was top secret and I was under a security clearance.

10. While I was at the Eniwetok Atoll I was issued five radiation film badges. I had to change badges very frequently because I was involved in decontamination. I had the highest radiation rating of anybody I knew because of my orders to decontaminate the radioactive planes. The V.A. says that I had only 3 badges and had a reading of 5.492 but they do not say anything about my other two badges. I also inhaled the radioactive mist that came from the plane. This radiation would not register on my film badges.

11. The V.A. told me that once the BVA denies my appeal that is the end of my case. I found out, however, that even after the BVA denies my appeal I can refile. What the V.A. told me was therefore very misleading. I know that many other veterans also are misled and give up after the BVA denies their appeals because they do not know that they can refile with new evidence.

12. The V.A. adjudication system is a very adversarial system. The V.A. made no effort at all to help me prove my case. Instead, they fought me at every turn.

13. I was represented before the V.A. by the D.A.V. My service officer had no idea how to handle a radiation case. He had very little knowledge of the legal issues and legal maneuvers involved and had no expertise in [] radiation area. I met with him only once, for about twenty minutes, on the day of my personal hearing.

14. Because of my disabilities I am unable to work. My wife and I live very meagerly. My medical expenses put us far below the poverty line. I am very dependent on the little disability compensation that I receive. I sorely miss the disability compensation that I am denied.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7 day of November at Blue Springs, Missouri.

/s/ Thomas McBee

THOMAS MCBEE

DECLARATION OF ELDON D. PRAISWATER (CAPTION OMITTED)

I, Eldon D. Praiswater, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Air Force and a member of the National Association of Radiation Survivors. I currently live at 205 South 8th Street, Odessa, Missouri 64076. I know the facts recited herein of my own knowledge and if called upon could competently testify to them.

2. I served as a member of the United States Air Force for twenty years, from 1940 to 1960, when I retired as a master sergeant.

3. I participated in the atomic test Dog Blast of Operation Greenhouse at the Eniwetok Atoll of the Marshall Islands, on April 5, 1951. I was assigned to a civilian company. I was responsible for taking high speed photographs of the atomic blast. On January 15, 1951 I was assigned to the island that was the target of Dog Blast. I helped set up the equipment to take high speed photographs of Dog Blast. Immediately after the blast, I was ordered back to the target island to remove photographic and other equipment.

4. On our way out to the island we went through radioactive fallout. Then, in removing the equipment from the site, I came within about one hundred yards of the ground zero point of the blast. I could see that the tower that had been ground zero was completely gone. A tank that had been at the base of the tower was also completely gone. The roof of the half buried quonset hut in which I had worked, which was about a quarter of a mile from the site, had been blown completely off, and bottom portion filled with sand.

5. I remained at the site after Dog Blast for about two hours. I then returned to the main island and was ordered to take six showers.

6. As a result of my exposure to ionizing radiation I suffer from a number of ailments. I suffered a massive heart attack in 1965 at the age of forty-three (half the age that my father was when he suffered a heart attack). In the

mid-1960's I was also diagnosed as having sugar diabetes, arterial occlusion and high blood pressure. I also had to have an operation for a prostate condition. I had a very enlarged parotid gland removed from my left ear in 1962. I also have had a cyst and several hydroceales removed from my elbow and numerous unusual warts removed from my face. I still have a number of these warts on my chest and armpits. I have a thyroid condition that was first diagnosed in 1979. The V.A. gave me medication for this condition for a year. After a year, however, they refused to give me any more.

7. I filed a claim for service connected disability compensation with the V.A. in February 15, 1981. It was denied. I was represented by the V.F.W. In my opinion, because the V.F.W. receives funding from the government, they are afraid to press the issue of radiation related disabilities.

8. Moreover, my V.F.W. representative had no experience or training in radiation cases. I met with him only once. The meeting lasted about five minutes. I do not even know his name. He did not seek to obtain any documents to help prove my case. He retained no expert to testify. He requested no personal hearing on my behalf.

9. After the V.A. denied my claim I simply gave up. I never had or was aware of my right to a hearing. I believed that it would be useless to fight the V.A. because the V.A. possessed far greater resources than I.

10. The V.A. made no effort to help me prove my case. For example, the V.A. had my orders and therefore knew the dates and places of my exposure. Yet they kept insisting that I provide the information. The large parotid gland on my ear was removed at a V.A. hospital in Wadsworth, Kansas, yet the V.A. has consistently told me they have no medical records of the operation. I had my heart attack in a military hospital at Richard Gebaiur Air Force Base, Grand View, Missouri. The Air Force and the V.A. hospital have told me that those medical records have been lost.

11. The V.A. disability adjudication system is a very adversarial system. I do not believe that the V.A. assists atomic veterans in any way.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of November, 1983 at Odessa, Missouri.

/s/ Eldon D. Praiswater

ELDON D. PRAISWATER

**DECLARATION OF LEONARD W. SCHROETER
(CAPTION OMITTED)**

I, LEONARD W. SCHROETER, do hereby declare and state as follows:

1. I am an attorney licensed to practice law in the states of Washington, Massachusetts, New York and California, and admitted to practice before the United States Supreme Court. I graduated from Harvard Law School in 1951 and joined the National Legal Staff of the National Association for the Advancement of Colored People, Inc., Fund following graduation. Twenty-three years ago, I was the founding partner of the law firm, now known as Schroeter, Goldmark & Bender. The firm's ten attorneys and 43 employees primarily provide representation to victims of medical negligence, product liability, and environmental and occupational toxic torts. We also represent large numbers of industrial workers in workmen's compensation cases, and disabled people in Social Security proceedings. I have served as President of the Washington State Trial Lawyers' Association, and have been active in and an officeholder of ATLA and other legal and civic groups. I am a veteran of World War II. I have handled claims of veterans (particularly of the Vietnam period) in the context of third party litigation involving Agent Orange and claims under the Federal Tort Claims Act. I have also had clients who were victims of service-related pharmacologic experimentation and medical negligence at Veterans Administration hospitals.

2. I am neither a member of the organizational plaintiffs, nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. §§ 3404-3405 and the nature of plaintiffs' claims in this action.

3. I know the facts cited herein of my own knowledge, and if called upon could testify competently to them.

4. The \$10 fee provision absolutely precludes handling Veterans Administration claims for this office, or any other I know about. We have only been able to handle veterans' claims when they have involved third parties or have had

some other feature which makes it possible to circumvent the Kafkaesque bureaucracy and draconian fee restraints of §§ 3404-3405.

5. Veterans' claims involve increasingly technical matters of scientific proof, medical causation and multiple etiology. The increasing complexity of veterans' claims parallels the increasing complexity of claims in the fields of medical negligence and product liability. No attorney can construct even a minimally adequate case and pursue a claim through the lengthy, obstructive administrative process given the ridiculous fee limitation. All of these claims are at least as complicated as claims under the Social Security or workers' compensation systems, in which attorneys receive full fees.

6. In combination, the Feres Doctrine, \$10 fee limitation and Byzantine complexity of Veterans' Administration procedures result in depriving veterans of access to the legal system. Veterans almost never are able to receive legal representation, or competent representation of any kind.

7. As a group, veterans have suffered from numerous medical-legal disabilities, yet their rights are unvindicated. The fee limitation completely eviscerates whatever "paper rights" are bestowed on veterans. Although the Seattle Veterans' Action Center (SEAVAC) and the Vietnam Veterans' Leadership Project attempt to provide assistance to Puget Sound area veterans, these under-funded groups are certainly unable to fill the vacuum created by the inability of attorneys to handle veterans' claims. I do not know of any group or attorney that can or does undertake the preparation required for the submission of the numerous medical or science-based claims of veterans. It is patently obvious that these are not claims which can be handled by lay persons. Until the fee limitation is removed and the bureaucracy streamlined, veterans' rights will continue to lack any substance, and the Veterans' Administration bureaucracy will remain the graveyard of all claims. I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ Leonard W. Schroeter
LEONARD W. SCHROETER

Dated: APRIL 11, 1983

SUBSCRIBED AND SWORN to before me this 11 day of April, 1983.

/s/ Laurie Coleman

LAURIE COLEMAN

Notary Public in and for the State of Washington, residing at Seattle.

DECLARATION OF MALCOLM C. SOUNESS
(CAPTION OMITTED)

I, Malcolm C. Souness, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Army. I live in P.O. Box 65 White Creek, New York 12057. I know the facts recited herein of my own knowledge and if called upon could testify competently to them.

2. I was in the Army from November 30, 1959 until October 20, 1960. Upon entering the military service I was assigned to basic training at Fort Benning. Soon thereafter, I injured my neck and back during a training exercise. There was significant damage to my spinal cord (myelopathy). To this day I suffer from cervical and lumbar spondylosis (degenerative disc disease). I have had surgery three times to correct this problem.

3. I first filed a claim for my disabilities with the V.A. in November of 1960. The government had lost all of my medical and service records. My claim was denied for lack of evidence.

4. In 1964 I went to a V.A. hospital in North Hampton, Massachusetts, for a medical examination. I told the V.A. at that time that I wanted to file a claim for compensation. I was led to believe that my claim would be considered at that time, but the V.A. took no action on it. The records of my medical examination from the North Hampton V.A. Hospital cannot be found.

5. I filed a claim again in 1970 in the Boston, Massachusetts office. It was transferred to the Providence, Rhode Island office. This office had a practice, I understand, of denying every claim automatically without checking the merits and then only considering the merits of the claim if the denial was appealed. I appealed the denial but the claim was again denied.

6. In 1974 I filed again. I represented myself and was able to obtain a 20% rating for my back condition, but benefits were not awarded retroactively. At this point I retained, on a pro bono basis, a lawyer from Worcester,

Massachusetts named Michael Brockelman. We appealed the decision, claiming that benefits should have been awarded retroactively, but the BVA thought there was no error. Mr. Brockelman asked the BVA for reconsideration, but they refused to reconsider their decision. The representation that I received from Mr. Brockelman was far superior to the representation that I had previously provided for myself and far superior to the representation that I subsequently received from the Disabled American Veterans.

7. In 1978 I filed again with the White River Junction, Vermont office of the V.A. The claim was transferred to the Albany, New York office and then to the New York City office. I asked for a hearing, but never received one. Finally, after a great deal of time I received an auxiliary statement of the case from the V.A. I finally received a hearing before the BVA in September of 1982. They remanded for a medical exam.

8. When I filed my claim in 1978 I was represented by the Disabled American Veterans ("DAV"). At least, they were technically my representative. Their actual representation has been virtually non-existent. They have done nothing to help me. They wrote one letter in an attempt to get some of my medical records, but they spelled my name wrong. The DAV has done nothing else to help me obtain evidence in support of my claim. I sent my substantive appeal to the DAV's New York City Regional Office representatives in 1979. They did nothing with it. Subsequently, the V.A. claimed that I could not raise many of the factual and legal errors committed by the V.A. because they were not certified by my substantive appeal. I charged the DAV with neglect and incompetence with the Assistant General Counsel of the V.A. I have since withdrawn the power of attorney that I granted to the DAV.

10. Throughout the years I have had a great deal of trouble representing myself before the BVA. I have made five requests for my latest medical records and have never received them. I have never been able to obtain all my service records. I have been denied due process by the BVA at every level. I have a great deal of trouble trying to write briefs myself and I am very frustrated by this. It also

costs me a lot of money to drive 40 miles to a library to attempt to figure out analogous cases. Also, because I am not a lawyer, I know that I am missing many of the legal points.

9. When I had my hearing before the BVA, I only met with my DAV officer once, on the day of my BVA hearing. The DAV officer would not make any of the arguments I wanted him to make before the BVA. There were many factual and legal errors that I wanted to raise. Yet, he told me that only three very narrow issues could be heard. When my claim went to the BVA, the BVA would only hear those three selected issues. These were not the issues that I wanted them to hear. The DAV did nothing to attempt to get these other issues before the BVA. I wrote to the Disabled American Veterans and complained about my service representative. The response I received from the Disabled American Veterans was that since I am attempting to withdraw my power of attorney, they are not going to help me. Then, subsequently, I received a letter from them telling me that if I don't respond within two weeks they are going to proceed without me.

12. I can't believe the V.A. calls itself a non-adversarial system. They have turned the claim process into an incredibly adversarial system.

13. I have written to several lawyers to attempt to obtain representation, but they have all refused to represent me before the V.A.; Legal Aid has also refused me.

14. I am unable to work because of my disability, which is steadily worsening. I am greatly in need of V.A. disability compensation in order to help support myself.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of November, 1983 in White Creek, New York.

/s/ Malcolm C. Souness
MALCOLM SOUNESS

**DECLARATION OF RICHARD B. STANDEFER
(CAPTION OMITTED)**

I, Richard B. Standefer, declare and state as follows:

1. I am a Deputy Vice Chairman of the Board of Veterans Appeals of the Veterans Administration. The basic duties and responsibilities of my position involve the supervision of ten of the nineteen sections of the Board.

2. I have been associated with the Board since 1970. During this period, I have held various positions including that of attorney advisor, Board Member, and Chief Member and as a result I am familiar with all major aspects of the Board's operations.

3. Statistics prepared and maintained by the Board's staff record the type of representation of an appellant, either a recognized veterans service organization representative, or an attorney or claim agent, as well as appellants who were not represented. These statistics also show the representation by disposition of case, either allowed, denied, or remanded to a regional office for further development. The statistics compiled do not differentiate between attorneys or claim agents. The Board's designation of a representative as either an attorney or claim agent for this statistical category is governed by the provisions of 38 C.F.R. §§ 19.152, 19.153, and 19.154. This recording practice has existed in above described format for at least 21 years.

4. These statistics show that during the past year 86.3% of appellants were represented by recognized veterans organization claim representatives; 2.1% were represented by attorneys or agents; and 11.6% of the representation of appellants fell into the "none" category. (The "none" category includes *pro se* appellants or appellants whose representatives were close family members.) In appeals where a recognized veterans organization claim representative represented the appellant, 14.0% were allowed, 69.7% denied, and 15.3% remanded; in appeals where either an attorney or agent represented the appellant, 12.8% were allowed, 67.5% denied, and 18.6% were remanded. In the "none"

category, 11.4% of the appeals were allowed, 71.7% denied, and 16.1% remanded.

5. Although as described above, the Board's statistics do not separately rate the performance of attorneys and agents, based on my experience at the Board, I estimate that attorneys, as opposed to agents, act as representatives in approximately 98% of all cases included in the "attorney or agent" category. Accordingly, because of the small percentage of agent represented cases included in the "attorney or agent" category, the only reasonable conclusion that can be drawn is that separate performance rates for attorneys would closely approximate the rates shown in the present "attorney or agent" category.

6. I declare and state under penalty of perjury that the information set forth herein is true and correct, to the best of my knowledge and belief.

/s/ RICHARD B. STANDEFER

RICHARD B. STANDEFER
Deputy Vice Chairman,
Board of Veterans Appeals

Executed on NOVEMBER 18, 1983.

**DECLARATION OF RALPH C. VAUGHAN
(CAPTION OMITTED)**

I, Ralph C. Vaughan, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Air Force. I live at 2890 California Street, Apt. 305, San Francisco, California 94115. I know the facts recited herein of my own knowledge and if called upon could competently testify to them.

2. I enlisted in the United States Air Force on January 4, 1942 and served my country in World War II. I was discharged November 21, 1945 as a master sergeant with the Fourteenth Airborne Division.

3. I am seventy-one years old, sick and severely disabled. I suffer from diabetes mellitus, hypertension, arteriosclerotic cardiovascular disease, shortness of breath, chest pains, angina pectoris, and pain in my legs, hands and arms. My total monthly income is \$515 from Social Security Retirement and \$65.88 from a union pension.

4. Prior to April 14, 1982 I received a Veteran's Aid and Attendance Pension. On April 14, 1982 the V.A. sent me a letter stating that my pension had been awarded "erroneously" and that my benefits were terminated. The V.A. never gave me any notice before it terminated my benefits. Nor, of course, did the V.A. provide me with a pre-termination hearing. I do not know why my benefits were terminated. A true copy of the April 14, 1982 letter is attached hereto as Exhibit A and incorporated by this reference. I was advised that I was not eligible for the "housebound" rating in that my income was alleged to be over the limit for that pension. This was done without any medical or financial documentation from me whatsoever. The letter stated: "Your expected income of \$6,417 exceeds the limit of \$6,064 applicable to you as a veteran who is housebound." In a letter dated February 8, 1983 the V.A. states, "the income limit for a veteran entitled to the housebound rate is \$6,513." My income for 1982 was \$5,976 from SSA; \$587 from a labor union pension fund; and \$54 other; for a gross net of \$6,577 I had out of pocket medical

expenses of \$954, giving me a total of \$5,622. As a result of the termination of my pension, I am no longer provided with insulin for my diabetes by the Hospital. This alone costs several hundred dollars per year.

6. On September 13, 1983, I was examined by a psychiatrist, a neurologist and an internist at the V.A. Medical Center in San Francisco. I have a very difficult time walking and underwent this examination at much stress, including shortness of breath and leg pain, while traveling long corridors with no places to sit. According to the V.A., the neurologist says that I do not need household care, but they would not let me read his report. The V.A.'s "Supplemental Summary of Evidence and Adjudicative Action" covering that review makes no mention of the report of the internist. Similarly, the blood and urine tests, X-rays and electrocardiogram that I underwent were not made part of the record by the V.A.

7. The V.A.'s procedures seem to drag on forever. I doubt that I will still be alive by the time my case is finally decided. It is very difficult for me to keep up with all of the deadlines and procedural technicalities. Trying to keep abreast of the administrative actions taken in this case has been a monumental hurdle for me, and at times caused me so much tension that I have sought psychiatric counselling and medication, adding to expenses from my meager income. For example, in a letter dated February 8, 1983 the V.A. states, "Our records show that we wrote you on September 1, 1982 informing you that we were unable to reinstate your pension payment." I never received notice of the decision from the V.A., nor was I furnished with a copy of the decision. I am always afraid that an appeal period will expire before I receive notice of the V.A.'s latest decision. On May 10, 1983, the V.A. notified me, "We have reinstated your pension benefits for the period April 1, 1982 to January 1, 1983. We paid you as a single veteran at the household rate." The letter had been sent to an old address. I received it on August 20, 1983. I have received no pension payments from the Veterans Administration since April 1, 1982.

8. The V.A. subsequently sent me a letter stating that I have a right to a hearing, but that a hearing will not do any good. Because it is difficult for me to get about, I did not try to force the V.A. to give me a hearing. On June 7, 1983, the local V.A. office ruled against me. The claim has been sent to the BVA in Washington, D.C. I do not know what information was forwarded to the BVA. I do not know whether there has been a hearing. A true and correct copy of the Supplemental Statement of The Case that I sent to the V.A. on September 23, 1983, detailing my mistreatment by the V.A., is attached hereto as Exhibit B and incorporated by this reference. It was prepared by my nephew, F. Hans Williams, who is not a lawyer.

9. I asked the San Francisco Neighborhood Legal Assistance Foundation to represent me, but they told me that they do not handle V.A. claims.

10. I called the office of Mr. Hickman, an attorney, to ask him to represent me. I was informed that Mr. Hickman could not represent me because of the \$10 fee limitation. I was also rejected by another lawyer, Mr. Dinkelspiel. I do not trust the V.F.W. to represent me because I do not think that they will be vigorous in representing me against the government. Therefore, I am defenseless against the V.A. bureaucracy. The V.A. has confused me as to the provisions and qualifications for my entitlement. For a sick and disabled person, the V.A. adjudication system is a nightmare of procedural hurdles. The \$10 fee limitation prevents me from hiring an attorney to represent me in this adversarial system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of November, 1983 at San Francisco, California.

/s/ Ralph Vaughan
RALPH VAUGHAN

DECLARATION OF REASON F. WAREHIME (CAPTION OMITTED)

I, REASON F. WAREHIME, do hereby declare and state as follows:

1. I am a veteran of the United States armed forces and a member of the Disabled American Veterans (DAV) of which I am Adjutant and Chaplain of the Vietnam Veterans Memorial Chapter 58, and of the National Association of Radiation Survivors, of which I am Director of Membership Services. I served in the United States Marine Corps from June 17, 1943 to February 4, 1947. From April 8, 1947 to December 14, 1948, I was a member of the Marine Corps Active Reserve. I served in the United States Army from January 31, 1949 to May 5, 1958, when I was honorably discharged.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

3. My first exposure to atomic radiation occurred in August and September of 1945, when I served as a member of the occupation forces assigned to a clean-up detail in Nagasaki, Japan, shortly after the detonation of an atomic bomb there. At the time of this exposure I was assigned to Company "C," First Battalion, Eighth Marine Regiment, Second Marine Division, United States Marine Corps. My unit was landed and marched to ground zero at Nagasaki, where we camped for a few days before being ordered south. No measures were taken to prevent exposure to radiation at Nagasaki.

4. My second exposure to atomic radiation occurred in April, 1953, during Operation Upshot-Knothole, Shot Simon, at Yucca Flats, Nevada. I was present at this test shot while on temporary duty from the 526th Armored Infantry Battalion, United States Army, Fort Knox, Kentucky. The unit I was assigned to, and for which I served as First Sergeant, was composed of 250 enlisted men from various military bases throughout the country. The test consisted of the detonation of an atomic bomb from a tower as a remote-controlled B-24 or B-25 bomber con-

taining a chimpanzee flew overhead. As described to us before the detonation, the bomb was slightly larger than the ones used in Japan. My unit was in a trench that was situated approximately 2,000 yards from ground zero. Protective measures were limited to covering our eyes with our hands and stuffing cotton in our ears. After the explosion, we were told via a loudspeaker to "get up and look at it." We then saw that a ball of fire was directly over our heads, indicating that we were in the "stem" of the mushroom cloud. The heat from the explosion felt like the sun burning my skin, and I and the other men in my unit experienced nausea. The explosion caused dust as thick as a dense fog, which settled on our uniforms. After watching the fireball for a few minutes, I received orders to move the men out in a skirmish line to check the damage done to the houses, sheep, and vehicles that were part of the test. I reached down to pick up the sack lunch I had left on the edge of the trench and found that it had been reduced to one small piece of charcoal. I then commanded the unit to advance to ground zero. In December, January, and February of 1953-54, I suffered a complete loss of body hair. My hair later grew back, but was much lighter in texture.

5. I have a number of service-connected disabilities, some of which I believe to have been caused by the exposures to atomic radiation described above. My non-radiation-related disabilities include loss of vision in the right eye and three gunshot wounds, one of which has left my left arm paralyzed. My radiation-related disabilities include the following: allergic reaction to metal since Shot Simon; loss of voice for five days in November or December of 1954; loss of all teeth in 1955; sterility since 1954; osteoporosis of the bone, first diagnosed in 1976; cataracts on the right eye, first noted in 1976, failure of bones, muscles, and nerves to heal from injuries; atrophy of muscular tissue; deterioration of muscle and bone in left leg; severe pain in leg, hip, and small of back; and lung cancer, causing three quarters of my left lung to be removed in April, 1982.

6. I have filed numerous claims for disability benefits with the Veterans Administration. I filed the first of these claims in early 1959 on the basis of my gunshot wounds, eye

injury, and sterility, and received a thirty percent disability rating on the basis of the gunshot wounds and eye injury. I filed additional claims in 1973, 1975, 1976, 1977, 1980, all of which have been denied in whole or in part. I have filed Notices of Disagreement and Substantive Appeals in most or all of these cases. The claim I filed in 1980 has twice been remanded by the Board of Veterans Appeals in Washington, D.C., and is now pending before the Veterans Administration Regional Office in San Francisco, California.

7. My representation before the Veterans Administration in 1959 was *pro per*. In 1973 I was represented by the American Legion, and since 1976 I have been represented by the DAV. The assistance I received from these service organizations, however, was minimal, and I did virtually all of the work myself. I attended conferences with my various service representatives over the years, but found that these representatives merely agreed with whatever I said. I therefore undertook to procure all documents necessary to support my claims and composed and typed the supporting statements myself. My service representatives did not file briefs on my behalf, except for a one-sentence statement regarding my claim for compensation for lung cancer. At the one Veterans Administration hearing that I personally attended in San Francisco, my service representative, G.J. Pajo of the DAV, merely introduced me and then remained silent. When I attempted to speak myself, I was cut short by the hearing officials. At a hearing on one of my claims in Washington, D.C., no representative familiar with my case was present; the representative handling my case was unable to attend the hearing due to a death in the family, and the DAV sent another representative instead. At the present time, I do not know what DAV representative is assigned to my case. When I last called the San Francisco office of the DAV, I asked for Mr. Pajo and was told he was no longer handling my case. I was not told which representative has replaced him on my case, nor did I inquire, because my experience of frustration with the DAV has convinced me that seeking help from them is not worthwhile. Generally, I have found that representatives of

the service organizations I have dealt with are overworked, ill-equipped in terms of medical knowledge, and unskilled in techniques of examination.

8. At the time I filed my first claim for disability compensation in 1959, I consulted an attorney in Washington, D.C., regarding my case. The attorney told me that he was unable to take my case because of the \$10.00 fee limitation imposed by 38 U.S.C. §§ 3404 and 3405. The attorney advised me to go to the American Legion for assistance. I subsequently dealt with attorneys in connection with a 1977 claim I filed for injuries due to malpractice by doctors at the Veterans Administration Hospital in Fresno, which caused permanent damage to my left foot. I consulted three attorneys before finding one, Robert T. Durbrow, Jr., of Clovis, who was willing to take my case. Mr. Durbrow took my case on a contingency basis as a personal favor and filed suit in the United States District Court for the Eastern District of California. Sometime before trial, however, Mr. Durbrow was informed of the \$10.00 attorney's fee limitation that applied to my case. After learning of the limitation, he ceased to invest any significant time or effort in my suit. The case was ultimately decided adversely to me.

9. I received little assistance from the Veterans Administration in preparing my case. I experienced difficulty and delay in obtaining responses to my requests for documents, such as copies of reports submitted to the VA by doctors who had examined me in connection with my claims. The San Francisco regional office of the VA has attempted to discourage me from exercising my right to a hearing, advising me that such a hearing would cause delay and implying that it would not result in a change in the rating board's decision. A true copy of the letter containing these statements is attached to the complaint as Exhibit H and incorporated herein by this reference. In a letter dated August 6, 1981, an adjudication officer advised me that inquiries concerning my appeal might result in delay in its consideration. A true copy of this letter is attached as Exhibit A to this Affidavit and incorporated herein by this reference. The Board of Veterans Appeals also sent me and Mr. Durbrow, my attorney at the time, a letter, dated January

22, 1982, informing me of the \$10.00 fee limitation. A true copy of this letter is attached to the Complaint as Exhibit F and incorporated herein by this reference.

10. My disabilities prevent me from working. The sole source of income for myself and my wife is my monthly benefit from the Veterans Administration, which presently amounts to \$549.00. Because of financial constraints, I have been unable to pay for expert witnesses to testify in my behalf before the VA and I have been unable to attend all but one of my personal hearings. On about six occasions, I have traveled from my home in Riverdale to San Francisco, a distance of approximately 225 miles, to meet with my service representatives, all at my own expense.

11. Although my initial 1959 claim was partially granted, my later claims have been largely unsuccessful. I have filed several Notices of Disagreement with the San Francisco Regional Office of the Veterans Administration, and several Substantive Appeals with the Board of Veterans Appeals in Washington, D.C. I requested personal hearings whenever possible and submitted extensive rebuttals to the Veterans Administration's versions of the facts. The BVA denied one of my claims in 1980 and remanded another of my claims in 1982. The latter claim was remanded again in 1983.

12. My experience with the Veterans Administration essentially has been one of frustration. It is my belief that the main object and effect of the Veterans Administration procedures is to discourage veterans and induce them to abandon their claims. Because of my experience as an officer in two veterans organizations, *see supra* ¶ 1, I was unable to persevere longer and to present my claims more effectively than most veterans; in all other respects, I believe my experience was typical. I personally have seen numerous other veterans with service-connected disability claims give up due to the frustration caused them by the Veterans Administration. In my own case, I have seen the VA inexplicably ignore evidence favorable to my claim, such as the statement by a VA doctor that I am "totally disabled for any form of work." A true copy of this statement is attached as Exhibit B to this Affidavit and incorporated

herein by this reference. Far from assisting veterans in the prosecution of their claims, the Veterans Administration constitutes the biggest adversary any veteran has.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: July 13, 1983

/s/ Reason F. Warehime _____

REASON F. WAREHIME



Veterans
Administration

100-3-100

In Reply Refer To: 34 3-215-2

Mr. Reuben F. Warehime
P.O. Box 398
Riverdale, CA 93056

C 13005 387

Dear Mr. Warehime:

Your appeal and the records are being placed on the docket of the Board of Veterans Appeals, Washington, D.C., for their disposition. However, the records will be held in this office until their transfer is requested by the Board of Veterans Appeals.

Appeals are considered by the Board as promptly as possible, in docket order. The removal of a case from the orderly course of procedure to reply to an inquiry may result in delay in the consideration of the case.

The Board will notify you of the determination made.

Sincerely yours,

Signatures

DAV

EL 1-26
Jul 1980 PS.

EXHIBIT A

IMPORTANT. Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.		VETERANS ADMINISTRATION APPEAL TO BOARD OF VETERANS APPEALS	
1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (If different from official name)		2. CLAIM FILE NO. OR CLAIM NO. INCLUDE PREFIX.	
WAREHIME, REASON F., JR.		C-13 005 384	
3. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN INDICATE RELATIONSHIP			
<input type="checkbox"/> SPOUSE <input type="checkbox"/> CHILD <input type="checkbox"/> MOTHER <input type="checkbox"/> FATHER <input type="checkbox"/> OTHER (Specify)			
4. NAME OF CLAIMANT (If other than veteran)			
Post Office Box 398 Riverdale, Calif. 93656			
DATE OF DECISION BEING APPEALED		5. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State)	
April 9, 1961		Regional Office, 211 Main Street, San Francisco, Calif.	
REPRESENTATION <input checked="" type="checkbox"/> See Par 6 of instructions on reverse side <input type="checkbox"/> None			
HEARING <input checked="" type="checkbox"/> See Par. 7 of instructions on reverse side <input type="checkbox"/> YES <input type="checkbox"/> NO		9B. IF YES, SPECIFY PLACE <input type="checkbox"/> FIELD OFFICE <input type="checkbox"/> WASHINGTON D.C.	
10. TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)			
<p>In reference to the Statement of the Case in the appeal of the undersigned the following argument is set forth on a paragraph basis in answer to said Statement of the Case:</p> <p>CLAIMANT'S CONTENTIONS: The undersigned contends that he is wheelchair bound due to the severity of the service connected injuries to his left arm and back. The undersigned has not been able to take Physical Therapy Exercise treatments to strengthen his injured left leg, due to the weakness of said arm and back, consequently the leg has atrophied to the extent of disuse causing total disability.</p> <p>SERVICE: Once again I shall inform the V.A. that this veteran served on active duty with the USMC at Fort McHenry, Maryland from April 1947 to January 1949 as a Corporal.</p> <p>MARCH 26, 1960: It should be noted in the decision of the Board of Veterans Appeals hearing, that the Appellant was not a witness and the representative for the Appellant (Disabled American Veterans) was not familiar with the case at the time of the hearing. It should also be noted that the Board returned that part of the Veterans Contentions that he has residuals of radiation exposure to the Regional Office for appropriate action, and since that time the Regional Office has done nothing in that line. Under Evidence in the Boards report of March it should be noted that the Veterans correct birthdate is June 23, 1926, and the military service should be as shown above. There are numerous other discrepancies in the Boards report that had this Veteran been present at the hearing, would not have happened.</p> <p>MAY 14, 1960: This Veteran has never been a patient at Palo Alto VAMC. On May 13, 1960 to June 13, 1960 this Veteran was hospitalized for examination of his leg to the back at the VAMC Fresno, at which time he was suffering extreme pain. It was discovered during said hospitalization that treatment with several Electronic devices by the Physical Therapy Department...several times a week, kept the</p>			
11. SIGNATURE OF CLAIMANT OR REPRESENTATIVE			
May 9, 1961			

Page 2
 Appeal To Veteran Board of Appeals
 VA Form 1-9
 Dtd: May 9, 1981
 MARINE, Reason F. Jr.
 C-13 005 324

pain at a tolerable level and this treatment, on a three or four times a week basis, is continuing at this writing, under the supervision of Dr. H.D. Bouman at VAMC Fresno.

This Veteran received payment for his one month hospitalization under the provisions of Para. 29, but has not been released from the hospital since that time. It is this Veterans understanding that payment at the 100% disability rate should have continued until the evaluation report of Feb. 10, 1981 (see attached SF 509) and then been reconsidered for a permanent rating by the Regional Office.

JUNE 17, 1980: The Outpatient record of this date was not a summary of the veterans condition (See attached SF509)

JUNE 30, 1980: See attached SF 509, which is a summary of this Veterans present condition.

JULY 31, 1980: No Comment.

AUGUST 16, 1980: It should be noted that this veterans military records show no Scoliosis of the spine prior to relieving the GSW to the spine, as noted after the injury in records dtd. May 1952. In fact in 1943 this Veteran was given a complete physical examination, including xray's of the spine when he was to be trained as a paramarine, at Camp Gillespie, El Cajon, California. The statement of the Scoliosis of the spine being "congenital" is a statement of opinion and is irrelevant. If xrays were normal it is quite apparent that the wounds caused nerve damage as prior to the wound the veteran had no history of back problems. It should also be noted that the veterans back pain has not been as severe in the past because he was not required to put strain on it in the past as he is required to do now with the use of crutches. However if there were no previous injuries to the back it is certain that modern physical therapy methods would have had his leg close to normal by this time.

SEPTEMBER 24, 1980: This Veteran took a direct hit to the L1 area of the spine, and although xrays reveal no damage except curvature of the spine, it is a well known medical fact that traumatic impact to the spine causes arthritis.

OCTOBER 22, 1980: No comment

OCTOBER 26, 1980: No comment

OCTOBER 31, 1980: See answer to September 24, 1980

NOVEMBER 14, 1980: No Comment

DECEMBER 1980: No comment

FEBRUARY 14, 1981: It is the opinion of the veteran that the examinations of Dr.'s Mahla and Downing were very poorly done. They were a waste of the veterans time, and the Veterans Administration's money. With all of the highly efficient Doctors in the Veterans Administration Medical Center, Fresno, it is hard to understand why the Regional Office insist's on sending veterans to Doctors of this caliber.

COMMENT'S ON PERTINENT LMS: It is the opinion of this veteran that the interpre-

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Appeal to Veteran Board of Appeals
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Dtd: May 9, 1981

REASONING, Reason F. Jr.

C-13 005 364

tations of the law are being carried out to the extreme. It is being completely overlooked that all of these injuries are to one person and can hardly be rated on a single injury basis. This veteran is one person who at the age of 54 has a complete loss of teeth, cataract's and blindness to one eye, a partially paralyzed left arm, a bad back, and a wounded knee, all of which are service connected, and a disabled left leg, caused by the mal-practice of a V.A. Doctor, that cannot be corrected due to the other service connected injuries.

REASON FOR DECISION: (comments) It is interesting to note that the evaluator agrees that the veteran is unemployable. It seems odd that the veteran is presently rated 60% disabled and if the non-service connected disability were to be rated it would be rated at 40%; yet in the opinion of the adjudicator the 40% disability is what makes the veteran totally disabled not the greater 60%.

VETERANS NOTE: Attached please find a copy of the latest summary by the VAMC Fresno, containing a complete evaluation of the veterans present condition.

As an additional comment I would like to point out that for the past forty years this veteran has recieved no medical attention outside of that given him by the U. S..Government. It seems odd that even though this veteran is totally disabled that the Veterans Administration still maintains that it is not the Governments fault. 11111

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Incls: SF Form 509 Medical Record

cc: Senator Cranston
Veterans File

MEDICAL RECORD

PROGRESS NOTES

2/6/81

RVS

It appears that patient has increasing difficulty in ambulating and is getting more pain and swelling in left leg. He needs a repeat PT evaluation.

2/10/81

PT

Patient was re-evaluated from 2/10/81 through 2/13/81. Patient received three evaluations: sensory (pain), manual muscle test, and functional evaluation. (See reports enclosed)

Sensory evaluation: Patient has diminished sensation in LUE in dermatomes C5, C6, C7, C8, T1, hypersensitivity in forearm C8 and wrist area at base of C7, C5, and med hand (C8), and numbness in digit #2 dorsal surface (C6) and digit #5 dorsal surface (C8). Patient has diminished sensation of LLE - thigh anteriorly in dermatomes L1-L2-L3-L4 and in lower leg and foot in dermatomes L4, L5, S1 (anterio-lateral and S1, S2 (posteriorly); numbness in L heel, and hypersensitivity in toes L foot dermatomes L4, L5, S1.

There is also some diminished sensation (50% accuracy) in forearm and hand RUE and hypersensitivity in R lateral foot in dermatome S1.

Muscle evaluation: The RUE has ROM and strength WNL. RLE has ROM and strength WNL. The trunk extensors are WNL. The abdominal muscles are fair. The LUE shows weakness (fair) in shoulder internal rotators and external rotators. The LUE wrist and finger flexors have fair and poor and 0 grades which would classify this portion of wrist/finger controls as non-functional. Patient wears a wrist cock up splint. The LLE has fair strength and, therefore, motion control and functional use of this extremity will require an assistive device.

Note: There is varying degrees of edema in the LLE lower leg and foot/ankle. There is consistent edema around malleoli and heel cord. With increased or prolonged activities there is increased edema from malleoli into the lower leg to the point of skin/brace upright contact.

Functional Evaluation:

Patient is essentially functional from the w/c. However, patient must use wrist splint for all activities in w/c (due to pain). Patient uses RUE for most fine motor activities with LUE only as assist.

(Continue on reverse side)

PATIENT'S ORIENTATION / For name of center, room, date, and time, and for name of staff, name, title, and hospital or medical facility.

REGISTERED

READING

Warehime, Reason
219-10-3569

PROGRESS NOTES

STANDARD FORM 509, Rev. 11-73
Prescribed by the GSA
FPMR (41 CFR) 101-11.6

Page 3
 Appeal to Veteran Board of Appeals
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 Dtd: May 9, 1981
 REASON, Reason F. Jr.
 C-13 005 384

tations of the law are being carried out to the extreme. It is being completely overlooked that all of these injuries are to one person and can hardly be rated on a single injury basis. This veteran is one person who at the age of 54 has a complete loss of teeth, cataracts and blindness to one eye, a partially paralyzed left arm, a bad back, and a wounded knee, all of which are service connected, and a disabled left leg, caused by the mal-practice of a V.A. Doctor, that cannot be corrected due to the other service connected injuries.

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////////////////////////////////////

Incls: SF Form 509 Medical Record

cc: Senator Cranston
 Veterans File

MEDICAL RECORD

PROGRESS NOTES

DATE

2/6/81

RVS

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2/10/81

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Functional Evaluation:

Patient is essentially functional from the w/c. However, patient must use wrist splint for all activities in w/c (due to pain). Patient uses RUE for most fine motor activities with LUE only as assist.

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or stamped names for X-rays, lab tests, etc.)
 Please print name, date, hospital or medical office

REG-513-40

1-4-80 NC

Wardtime, Reason
 219-10-3369

PROGRESS NOTES

STANDARD FORM 502 (Rev. 11-64)
 Prescribed by Law 394
 Page 11 of 11 11-64

508-1110

MEDICAL RECORD

PROGRESS NOTES

DATE

Standing, walking activities require wrist splint (L), SLS and crutches (Canadian oftstanc RUE and forearm wt. bearing crutch LUE). Patient experiences marked pain in LUE elbow, wrist/hand, with use of L crutch--although he will perform activities using the two crutches, due to the severe LUE pain and fair strength of LUE--safety is questionable. Use of one crutch (RUE) was attempted and is unsafe.

It should be noted that during the evaluations, patient experienced pain in LUE - elbow, wrist, and hand, as well as in LUE - ankle and foot; however, at no time did the patient refuse to attempt to perform any activity requested of him.

Susan Ben Brahmim, R.P.T.

Susan Ben Brahmim, R.P.T.

2/16/81
RMS

Physical Therapy evaluation shows extent of motor loss in L arm and L leg. Muscle function is further decreased below PT rating by increase in pain and severe swelling (oedema) in L leg. This is getting progressively worse since calcaneus fracture. Patient is essentially wheelchair bound and uses a one arm drive wheel chair. Standing and ambulation are impossible except for a few steps, due to pain and swelling in L leg and foot, and additional pain in left arm. It is apparent that patient's ability has seriously decreased since the fracture in April, 1977.

It should also be noted that the sensory evaluation shows an anesthetic area on the back from L1 to S1, essentially in the area of the old gunshot wound. Patient notes paresthesias down his legs from this area down.

Impression: Patient is totally disabled for any form of work. Ability to function in activities of daily living is getting considerable less, particularly since the fall and foot fracture in 1977, due to increasing pain and oedema.

W. J. P. 117

PATIENT'S IDENTIFICATION (For use of medical staff only - Name - at foot enable patient read, hear, understand or respond, for safety)

(Continue on reverse)

REGISTER NO

WARD NO

Waiting, Reason
219-10-3369

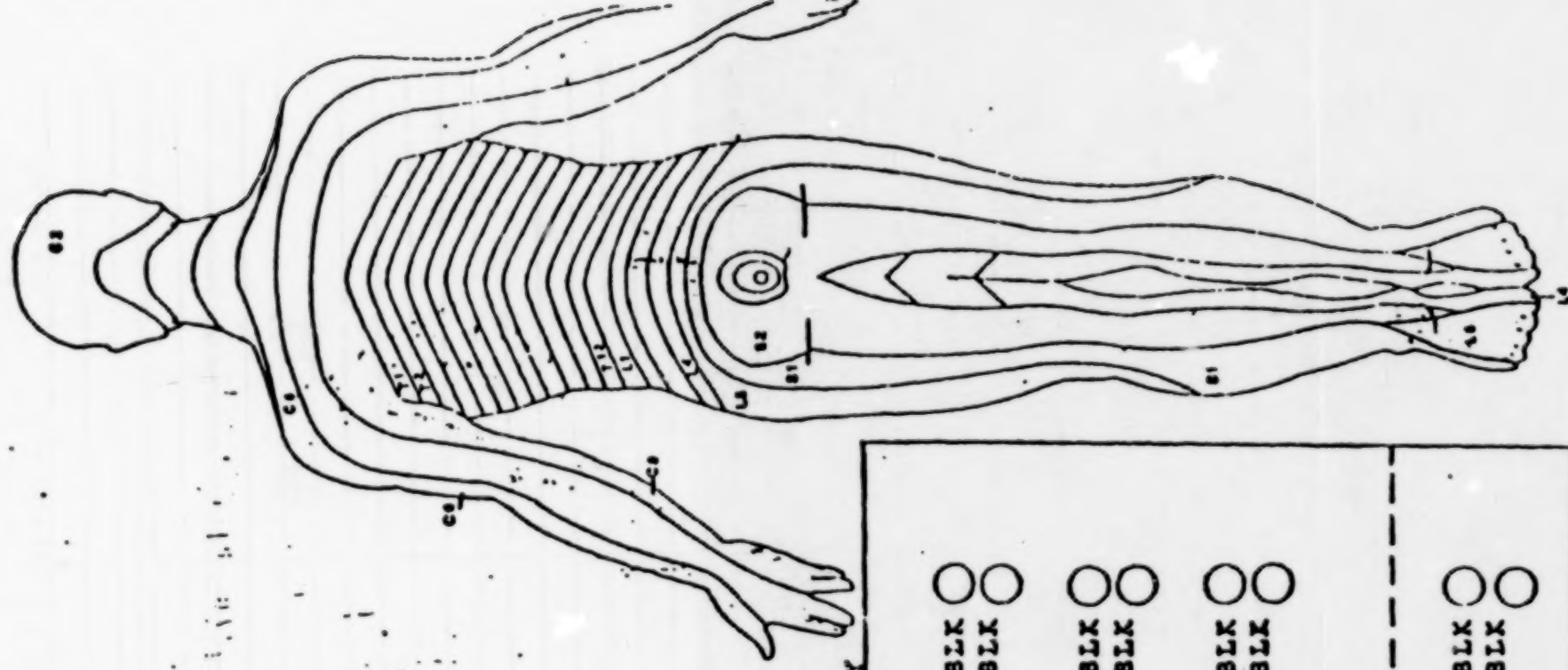
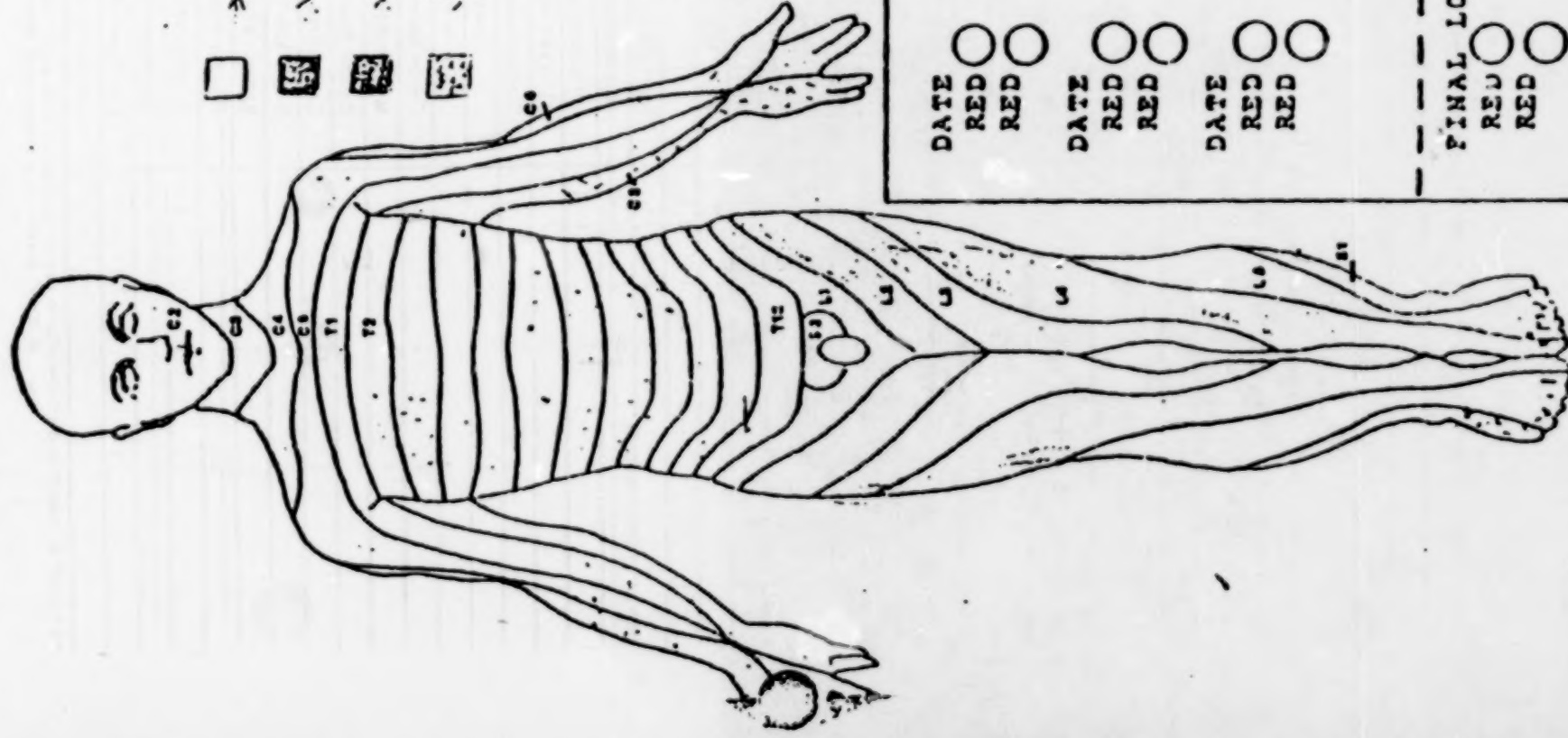
PROGRESS NOTES

STANDARD FORM 54 (Rev. 11-77)
Patient's Name
Date: 11-07-1977

504-110

PATIENT'S AT-HOME ELECTRODE PLACEMENT CHART - STAYODYN TNS

NAME _____



SUMMARY

DATE _____

RED RED

BLK BLK

DATE

RED RED

BLK BLK

W-42

RED RED

BLK BLK

FINAL LOCATIONS

REU REU

BLK BLK

INSTRUCTIONS

5:53pm

Clinical Record	Muscle and/or Nerve Evaluation—Manual and Electrical: Upper Extremity
<p>1. Date of examination</p> <p>2. Referring physician</p> <p>3. History of present illness</p> <p>4. History of past illness</p> <p>5. Social history</p> <p>6. Physical examination</p> <p>7. Laboratory studies</p> <p>8. Radiologic studies</p> <p>9. Pathologic studies</p> <p>10. Treatment</p> <p>11. Prognosis</p> <p>12. Follow-up</p>	<p>1. Manual muscle testing</p> <p>2. Reflexes</p> <p>3. Sensory testing</p> <p>4. Electromyography</p> <p>5. Nerve conduction studies</p>

DIAGNOSIS AND BRIEF CLINICAL HISTORY

LEFT													RIGHT												
← (Insert type of test given) →																									
EXAMINER'S INITIALS																									
DATE																									
SPINAL ACCESSORY NERVE																									
Sternocleidomastoid } —Stern. C2-3																									
} —Clav. C2-3																									
Trapezius—Upper C2-4																									
—Middle C2-4																									
—Lower C2-4																									
DORSAL SCAPULAR NERVE																									
Rhomboids C4-5																									
LONG THORACIC NERVE																									
Serratus Anterior C5-7																									
THORACO DORSAL NERVE																									
Latissimus Dorsi C6-8																									
UPPER SUBSCAPULAR NERVE																									
Subscapularis C5-6																									
LOWER SUBSCAPULAR NERVE																									
Teres Major C5-7																									
ANT. THORACIC NERVE																									
Pect. Maj.—Clav. C5-7																									
—Stern C6-8, T1																									
SUPRASCAPULAR NERVE																									
Suprascapular C4-6																									
Infraspinatus C4-5																									
AXILLARY NERVE																									
Deltoid—Ant. C5-6																									
—Middle C5-6																									
—Post. C5-6																									
Teres Minor C5-6																									
MUSCULOCUTANEOUS NERVE																									
Biceps Brachii C5-6																									
Coracobrachialis C5-6																									
Brachialis C5-6																									
RADIAL NERVE																									
Triceps C5-8, T1																									
Brachioradialis C5-6																									
Supinator C5																									
Ext. Carp. Rad. C5-7																									
Ext. Carp. Uln. C7																									

PATIENT'S IDENTIFICATION: (For typed or written entries give: Name-last, first, middle; grade; date; hospital or medical facility)

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**MUSCLE AND/OR NERVE EVALUATION—
MANUAL AND ELECTRICAL:
UPPER EXTREMITY**

ALCANTARA

LEFT		(Insert type of test given) →		RIGHT	
		EXAMINER'S INITIALS			
		DATE			
			Ext. Dig. Quinti C7		
			Ext. Ind. Prop. C7		
			Ext. Dig. Com. -1 C5		
			-2		
			-3		
			-4		
			Ext. Pol. Long C7		
			Ext. Pol. Brev C7		
			Abd. Pol. Long C7		
			MEDIAN NERVE		
			Pronator Teres C5		
			Palmaris Long. C5-8, T1		
			Flex. Carpi Rad. C6		
			Flex. Dig. Sub. -1 C7-8, T1		
			-2		
			-3		
			-4		
			Flex. Dig. Prof. -1 C3, T1		
			-2		
			Flex. Pol. Long. C5, T1		
			Flex. Pol. Brev. C5, 4		
			Abd. Pol. Brev. C6-7		
			Cep. Pollicis C6-8 T1		
			Lumbricales -1 C7-8		
			ULNAR NERVE		
			Flex. Carpi Uln. C5		
			Flex. Dig. Prof. -3 C8, T1		
			-4		
			Add. Pollicis C3		
			Abd. Dig. Quinti C3, T1		
			Cep. Dig. Quinti C3, T1		
			Flex. Dig. Quinti C3, T1		
			Interos. Sup. -1 C8		
			-2		
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			(ham) -1		
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			Longus -1 C4		
			-2		

Key to Manual Muscle Evaluation.

Key to Electrical Evaluation:
(Insert key used locally)

SIGNAL OF PHYSICIAN

DATE

MEDICAL RECORD

MUSCLE FUNCTION BY NERVE DISTRIBUTION: Trunk and Lower Extremity

PRACTICE AND CLINICAL INSTRUMENTS

KEY TO MANUAL MUSCLE EVALUATION

100%	5 N	Normal	Complete range of motion against gravity with light resistance
75%	4 G	Good	Complete range of motion against gravity with some resistance
50%	3 F	Fair	Complete range of motion against gravity
25%	2 P	Poor	Complete range of motion with gravity eliminated
10%	1 T	Trace	Evidence of contractility but no joint motion
0%	0 O	Zero	No evidence of contractility

INDICATE SIDE TESTED	DATE	COMMENTS
Erector Spinae T1-12, S1-3		
Rectus Abd T9-11		
Obi Ext Abd T7-12, L1-5		
Obi Int Abd T7-12, L1-5		
Quad Lumborum T12, L1-3		
Iliopsoas L1-4		
INF. GLUTEAL NERVE		
Gluteus Mx. L5, S1-2		
SUP. GLUTEAL NERVE		
Glut Med L4-5, S1		
Tens Fgs Lat L4-5, S1-2		
Int. Rotation		
Ext. Rotation		
FEMORAL NERVE		
Sartorius L2-3		
Quadriceps L2-4		
OBTURATOR NERVE		
Hip Adductors L2-4		
SCIATIC NERVE		
Biceps Fem L5, S1-3		
Semiten L4-5, S1-2		
Semimem L4-5, S1-2		
POST. TIBIAL NERVE		
Gastrocnemius S1-2		
Soleus S1-2		
Tib Post S1		
Flex Dig Long S1-2		
Flex Dig Brev S1		
Flex Hal Long S1-2		
Flex Hal Brev S1		
Abductor Hallucis S1		
Interossei S1-2		
Lumbricals S1-2		
COM. PERONEAL NERVE		
Tibialis Ant S1-2		
Ext. Dig Long S1		
Ext. Dig Brev S1		
Ext. Hal Long S1		
Peroneus Long & Brev S1		
Peroneus Tert S1		

PATIENT'S IDENTIFICATION For typed or written entries give: Name - last, first, middle, grade, SSAN, race, rate, hospital or medical facility

REGISTER NO

DATE

 MUSCLE FUNCTION BY NERVE DISTRIBUTION
 Trunk and Lower Extremity
 Standard Form 525 Rev. 1-64
 Prepared by GALELITE Press at Chicago 11-606-1
 518-104

SELF-CARE ACTIVITIES—FUNCTIONAL EVALUATION

TYPE OF DISABILITY

PRECAUTIONS

HANDEDNESS

☐ LEFT☐ RIGHT

ORTHOPEDIC APPLIANCE(S)

OCCUPATION (Prehospitalization)

AGE

INITIAL TEST

THERAPIST INITIALS

THERAPIST INITIALS

DATE INITIAL TEST COMPLETED

SCORING KEY

(Scores indicate skill accomplished within a reasonable time)

0—Cannot be accomplished.

1—Can be accomplished with human aid.

2—Can be accomplished with adaptation of environment (low bed, special toilet seat, hand rails, ramps, etc.).

3—Can be accomplished with use of mechanical aids (splints, braces, prostheses, crutches, wheelchair, etc.).

4—Can be accomplished without aids, adaptation or assistance.

SCORE

(RED X—indicates initial test; DATE—indicates change in condition)

ACTIVITIES

PART I—EATING

1. EAT WITH FINGERS

2. DRINK FROM CUP

3. DRINK FROM GLASS

4. EAT WITH SPOON

5. CUT WITH KNIFE

6. CUT WITH FORK

7. EAT WITH FORK

8. MAINTAIN SUITABLE POSTURE

9.

10.

11.

PART II—COMMUNICATION

12. WRITE

13. TYPE

14. USE TELEPHONE

15. OPEN ENVELOPE

16. REMOVE LETTER FROM ENVELOPE

17. PLACE LETTER IN ENVELOPE AND SEAL

18.

19.

20.

PART III—HYGIENE

21. TURN ON FAUCET

22. TURN OFF FAUCET

23. SHAVE

24. MAKE JO

25. WASH HANDS

26. WASH FACE

27. BRUSH OR COMB HAIR

28. SHAMPOO HAIR

29. BRUSH TEETH

SIGNATURE OF NURSE, PHYSICAL MEDICINE AND REHABILITATION

DATE

PATIENT'S LAST NAME—FIRST NAME—MIDDLE NAME

REGISTER NO.

WARD NO.

NAME OF HOSPITAL OR OTHER MEDICAL FACILITY

SELF-CARE ACTIVITIES—FUNCTIONAL EVALUATION

ACTIVITIES	SCORE			
	(RED X—indicates initial test; DATE—indicates change in condition)			
PART V—LOCOMOTION (Continued)				
82. SIT UP IN BED				
83. GET OUT OF BED TO CHAIR				
84. GET INTO BED FROM CHAIR				
85. GET OUT OF BED TO STANDING				
86. GET INTO BED FROM STANDING				
87. PROPEL WHEELCHAIR				
88. CHAIR TO STANDING				
89. STANDING TO CHAIR				
90. STAND				
91. STAND AND REMAIN IN ERECT POSITION				
92. WALK ON SMOOTH SURFACE—				
93. WALK BACKWARD				
94. WALK SIDEWARD TO LEFT				
95. WALK SIDEWARD TO RIGHT				
96. WALK ON ROUGH SURFACES INCLUDING RUGS				
97. WALK UP RAMP—				
98. WALK DOWN RAMP—				
99. GO UP FLIGHT STAIRS				
100. GO DOWN FLIGHT STAIRS				
101. GO DOWN CURB				
102. GO UP CURB				
103. GO DOWN CURB—CROSS STREET—GO UP CURB				
104. OPEN DOOR—GO THROUGH—CLOSE DOOR				
105. GET DOWN TO FLOOR				
106. GET UP FROM FLOOR				
107. MOVE ON FLOOR IN OTHER THAN UPRIGHT POSITION				
108. GO UP BUS STEPS				
109. GO DOWN BUS STEPS				
110. GET INTO AUTOMOBILE				
111. GET OUT OF AUTOMOBILE				
112. DRIVE AUTOMOBILE				
113. WALK CARRYING TRAY WITH DISHES				
114. PLACE TRAY ON TABLE				
115. GET INTO CHURCH PEW				
116. GET OUT OF CHURCH PEW				
117. GET INTO THEATER SEAT				
118. GET OUT OF THEATER SEAT				
119.				
120.				
121.				
PART VI—HOUSEHOLD				
122. OPEN DRAWERS				
123. CLOSE DRAWERS				
124. LOCK DOOR				
125. UNLOCK DOOR				
126. GET INTO CHAIR AT TABLE				
127. GET OUT OF CHAIR AT TABLE				
128. GET INTO UPRIGHT CHAIR				
129. GET OUT OF UPRIGHT CHAIR				
130. MAKE BED				
131. OPEN WINDOW				
132. CLOSE WINDOW				
133.				
134.				

**DECLARATION OF DORIS J. WILSON
(CAPTION OMITTED)**

I, Doris J. Wilson, declare and state as follows:

1. I am the widow of Stanley Wilson, who died on December 12, 1980 from pancreatic cancer. My husband, Stanley, served in the United States Navy, mainly in the Pacific Theatre, from June 22, 1943 to June 9, 1947. Several of the Navy ships to which Stanley was assigned after World War II were involved in atomic testing. On one of Stanley's ships that was contaminated with radiation from the blasts, several men lost their hair and others became nauseated. The officers and crew were troubled by their inability to decontaminate the ship.

2. In 1979, after Stanley was diagnosed as having cancer, I contacted a Sacramento, California, attorney to discuss a possible claim for V.A. Disability Compensation. He told me that he could not represent Stanley before the V.A. because of the \$10.00 attorney's fee statute. He also said that because of the \$10.00 limitation he doubted that I could find *any lawyer* who would take a V.A. Disability Compensation case. Because of this conversation, I gave up trying to find a lawyer to prosecute Stanley's potential Disability Compensation claim and Stanley never filed a claim.

3. As a result of his servicetime exposure to radiation, Stanley died of cancer on December 12, 1980. On December 17, 1981, I filed a V.A. Death Compensation claim with the San Francisco Regional V.A. Office. On January 14, 1982, my claim was denied by the San Francisco office as not service connected. On January 28, 1982, I submitted a Notice of Disagreement on a "Statement in Support of Claim" form, a true copy of which is attached hereto as Exhibit "A" and incorporated by this reference. In March 1982, I filed a Request for Extension to File Appeal so that I could collect more evidence, not knowing that I had up until a year from the original decision to file my appeal. My service representative, the Veterans of Foreign Wars, did not help me in searching for records of my husband's exposure to radiation and I found it to be a very difficult and time-

consuming process. I still have not been able to obtain many of Stanley's basic service records or obtain documentation of the particulars of my late husband's service-connected radiation exposure.

4. On May 5, 1982 I received a letter from the V.A. acknowledging my request for a hearing and attempting to persuade me to waive my right to a hearing. A true copy of this letter is attached hereto as Exhibit "B" and incorporated by this reference. On June 23, 1982, I received a letter from the San Francisco Office of the V.A. stating that I must submit any additional evidence to the San Francisco Office by January 22, 1983. I wrote a letter to the San Francisco V.A. Office on January 12, 1983, asking for more time to collect evidence. On January 18, 1983, two days before my time to file additional evidence with the San Francisco Office expired, my Veterans of Foreign Wars service office advised me to simply allow the time to file additional evidence to expire, suggesting that, if I lost, I could refile with additional evidence. I still desired an extension so that I could collect additional evidence of my husband's exposure to radiation. However, on February 15, 1983, my appeal was denied by the BVA.

5. At this point I am about ready to give up. The Veterans of Foreign Wars have not helped me at all in obtaining evidence. The one time that I was supposed to have a hearing before the San Francisco V.A. office my service officer did not meet with me one [sic] until minutes before the hearing was to be held. I had driven in from Carmichael, California for the hearing. The service officer spent several minutes frantically scrambling to come up with some evidence. Then, at the last second, he decided to waive my right to a hearing.

6. I have been very frustrated and discouraged by the adversarial nature of the V.A. adjudication system and by the total lack of help that I have received from the Veterans of Foreign Wars in obtaining evidence. I desire to hire a lawyer to represent me but cannot do so because of the \$10 fee limitation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of July, 1983 at Carmichael,
California.

/s/ Doris Wilson
DORIS WILSON

[VOLUME I]

DEPOSITION OF WESLEY J. HAWKE
OCTOBER 24, 1983
(CAPTION OMITTED)

[2]

* * * * *

EXAMINATION BY MR. ERSPAMER

MR. ERSPAMER: Q. Please state your full name for the record.

A. Wesley J. Hawke.

Q. What is your position with the Veterans [3] Administration?

A. I am a rating specialist. They call them veterans claims examiners.

Q. Are you in basically the same position as—

A. Tom Jacobson? Yes.

* * * * *

[4] Q. Okay. What is involved in the evaluation of disability claims?

A. Well, the first step is acquiring the evidence, requesting—if it's a service connected claim, requesting service medical records, then reviewing those service medical records; requesting an appropriate VA examination; after receipt of the VA examination, reading and evaluating the medical report by the doctor at the VA medical facility, and making an appropriate evaluation, according to our rating schedule, and then putting out a rating sheet.

* * * * *

[17] Q. Did you personally review the medical records of Mr. Maxwell in connection with the adjudication of this claim?

MR. STOLL: I direct the witness not to answer that question.

MR. ERSPAMER: Q. I direct your attention to this document that's dated June 13th, 1983, which you apparently received from Mr. Christian.

First of all, do you know Mr. Christian?

A. No.

Q. You never met him?

A. No.

Q. Directing your attention more particularly to the sentence that refers to reports filed by internees, do you see that reference there in the third paragraph?

A. Yes.

Q. Did you ever see any reports filed by internees yourself?

A. No.

Q. Did you ever see the camp rosters which are referred to in the first paragraph?

A. No.

Q. Did you personally speak to Mr. Christian with regard to the subject matter of this particular document?

A. No.

[18] Q. Did you speak to anyone with regard to the subject of the location of the Nagoya Camp 6?

MR. STOLL: I direct the witness not to answer that question.

MR. ERSPAMER: Certify that one, please.

Q. Did you personally review any of the medical reports with regard to Mr. Maxwell?

MR. STOLL: I direct the witness not to answer that question.

* * * * *

[19] Q. Did you receive any lectures in the POW Public Law 97-37, dated August 14th, 1981, called the Former Prisoners of War Benefits Act of 1981?

A. We received explanatory briefings on it, yes.

Q. What is your understanding of what Public Law 97-37 provides?

A. It basically provides the basis—the presumptive provisions for diseases and illnesses that all appeared—that POW's underwent and how we're able to assume, unless there are intervening causes, that these particular diseases are—if the veteran comes down with them, they're service connected.

Q. What are the presumptive conditions that you're aware of that are included?

A. There's about ten diseases or illnesses. One is malaria. I believe pellagra, psychosis, the anxiety neuroses, avitaminosis, and a couple of other ones that deal with malnutrition.

* * * * *

[20] Q. And the diseases you were just referring to are the ones stated here in Section 4?

A. Right.

Q. What is that one, helminthiasis?

A. Yes.

Q. Do you know what that is?

A. That's something to do, I believe, with malnutrition, some vitamin or something like that, a deficiency. But I haven't looked it up specifically.

Q. Chronic dysentery is another one. Those are the ones you are calling to mind—

A. Yes, right.

Q. —a few moments ago?

A. Right.

Q. Of those diseases listed there, which ones were involved in the claim of Albert Maxwell?

A. Mr. Maxwell is service connected for beriberi, post-traumatic stress disorder, optic atrophy, residuals of malaria. That's all.

Q. Those are conditions he is already service connected for; correct?

A. Correct.

[21] Q. What are the additional diseases listed there for which he has advanced claims, service connected death and disability compensation claims?

A. The main one is the multiple myeloma.

Q. What about gastrointestinal problems?

A. Okay. He also wanted to claim service connection for GI problems, hemorrhoids, arthritis, pain in the abdomen, varicose veins, and cardiovascular disease.

Q. He also claimed right upper quadrant pain as part of his claim, pain in the abdomen?

A. Yes, he did claim pain in the abdomen.

Q. In that connection are you aware of a study done by John P. Kirschner on liver disease among POW's—

A. No.

Q. —which identifies a parasite as a cause of right upper quadrant pain in POW's?

A. No, I'm not familiar with that.

Q. Are you familiar with any medical studies done of former POW's of medical problems experienced by former POW's?

A. I have read several articles concerning POW's around the various ailments that they have come down with.

Q. What are some of the articles that you have read?

A. I can't tell you that. I would have to go back and look at my POW book.

Q. You have a folder back in the office that deals specially with POW issues?

A. Well, I have a folder that I maintain for my own personal use to—whenever I get a POW claim, I get the [22] folder out and make sure I don't miss anything.

Q. What is included in your folder?

A. The current instructions concerning development of POW claims, copies of articles that have been passed along to us on POW claims, the appropriate letters that we send out to POW's, et cetera.

* * * * *

[27] A. Tropical diseases. The following diseases may be considered for service connection as a result of tropical service, although not otherwise established, as incurred in service if manifested to a compensable degree during the applicable time period under 3.307 or 3.308.

Q. You're reading from 3.309(b)?

A. Correct.

Q. Okay.

A. That gives a complete list of the tropical diseases.

Q. And it includes dysentery and cholera, malaria and various other ones?

A. Amoebiosis, black water fever, cholera—this one I never heard of. Dracontiasis, d-r-a-c-o-n-t-i-a-s-i-s.

Q. And the other ones listed there. You don't need to go through all of them.

Under Subsection C there are some specific prisoner of war diseases mentioned, and it basically includes the same group as mentioned in Public Law 97-37?

A. Yes. This Public Law basically added the psychosis and anxiety elements.

Q. I see. Now, in connection with your adjudication of the claim of Albert Maxwell, did you ever have occasion to speak to Mr. Leach?

A. I don't know any Mr. Leach.

Q. Do you ever recall reviewing an affidavit by a Senior Master Sergeant Albert L. Leach, who claimed to be present with Albert Maxwell in the Bataan Death March and the Infamous Hell Ships to the island of Japan and mentioning the [28] fact that he was incarcerated in Camp No. 6 in Nagoya, Japan with Albert Maxwell?

A. If it's in the claim file, I did.

Q. I believe I can represent to you that it's in his claim file. But you do not recall ever speaking to Mr. Leach?

A. No.

Q. Were you aware of the fact that Mr. Leach resides in Novato, California?

A. I have no idea.

Q. What is your usual practice when you get what are called, I guess, buddy statements with regard to a claim? Do you usually follow up on them and contact the veteran?

A. No, we don't follow up on them.

Q. What about if you get a veteran to submit the names of several of his buddies who were present at a particular occasion upon which he alleges resulted in a service connected injury, do you follow up on the names, try to interview the people involved?

A. No.

Q. Have you ever met Mr. Maxwell?

A. No.

* * * * *

[39] Q. And you have had occasion in making ratings to deny a claim for failure of proof?

A. Yes.

Q. That's a fairly frequent basis for denying a claim, is it not, failure of proof?

A. Yes.

* * * * *

[40] Q. Well, what is your understanding as to the catalog of reasons why those claims are denied?

A. Mostly for insufficient evidence to relate the claimed exposure to radiation to whatever disability the veteran is claiming.

Q. What is your standard workup, if you have one, in atomic radiation claims? Do you have certain things you do beyond the normal getting of the service records, getting the service medical records and perhaps ordering a physical exam? Are there any other things you do to develop an atomic radiation claim?

A. Well, we request service medical records. We request the appropriate form for listing any kind of exposure—I think it's form 1137—from the service department—not the service department, the Records Personnel Center. Usually if they've been exposed and they have the dosimeter readings, again that's on a form 1137, and we always request those.

Then if that's insufficient, then we request assistance from CO to coordinate with the Department of Defense. They have an organization—

[41] Q. Defense Nuclear Agency?

A. Yes. Then they request the information concerning atomic tests, as to the—what tests the particular veteran was on. If they don't have their dosimeter reading, they make a judgment as to the amount of radiation that he might—he or she might have been exposed to.

* * * * *

Q. Do you make any effort to assess the exposure from ingestion and inhalation?

A. No.

Q. Now, in your personal experience have you found that requests for hearings are fairly rare in the local [42] experience? Most claims, a request for a hearing is not asked for or made?

A. That's true.

* * * * *

[43] Q. Would it surprise you to learn that claimants who request hearings prevail twice as often as claimants who do not request hearings?

A. Yes.

* * * * *

VOLUME II

DEPOSITION OF WESLEY J. HAWKE
 NOVEMBER 3, 1983
 (CAPTION OMITTED)

[56]

* * * * *

Q. Now, getting back to my question, what development did you do in connection with the claim for multiple myeloma?

A. Well, the basic development that I made was making up the letter that would go to Central Office to verify or not verify the veteran's claim as to the location of his POW camp and whether or not he was—whether he came in contact, as he claimed, or went to the two cities that were bombed by the atomic blast.

Q. Can you indicate where in the file, the main file, that letter is? It is a letter, is it not, to the—is it the army personnel committee review or something to that effect?

A. Well, there was one other thing we did do to develop that I forgot about.

Q. Okay. Why don't you mention that first.

A. Okay. We did send off to the National Personnel Records Center to find out whether there was any kind of POW debrief on this person, which we didn't.

Q. Which you didn't find?

A. They could find no POW debrief on him.

Q. Weren't all the POW's debriefed?

A. I cannot answer that. I assume they were. However, the records for many of them—I don't know what became of them.

Q. Have you had difficulty in the past obtaining debriefing for other POW's?

A. Yes

[57] Q. Approximately how many POW cases have you attempted to find the debriefing records for?

A. I do not know the answer to that.

Q. Well, more than one, obviously?

A. Yes.

Q. More than five?

A. After that, I can't tell.

Q. But more than five?

A. I believe so, yes.

Q. Have you ever been able to get any debriefing records?

A. Personally, no. I understand that some of the other board members have.

Q. Did you attempt to get debriefing records of other POW's who were interred at Nagoya Camp 6 along with Mr. Maxwell?

A. No. We had no reason to request that particular information.

Q. Well, if the debriefing records of fellow prisoners in Nagoya Camp 6 show that the internees of Camp 6 were sent off to Hiroshima, that would be a fact you would consider relevant?

A. Yes, it would. That was one of the reasons why we wrote this letter to CO on the location of his Prisoner of War camp and whether or not he was exposed to radiation. The letter we sent off to CO was mailed—or did on May 16th, 1983. And I am referring to my list of notes.

Do you want me to look in the file for the specific [58] location of that?

Q. Yes, why don't you. Then you can just identify it for the record.

A. There it is there.

Q. You are referring to a letter dated May 16th, 1983, to the field director, western region?

A. That's correct.

Q. Isn't this the request for an advisory opinion?

A. That's correct. It includes trying to get information on the location of his Prisoner of War camp and whether or not he had been exposed to radiation.

Q. Where in there are you requesting debriefing records?

A. I am not requesting debriefing records. I am asking for the facts concerning what—we gave the facts that the veteran gave us, and we indicated that we were requesting information from them to either substantiate his claim or not to, and leaving it up to the people in Central Office to obtain the necessary information to either substantiate or deny his claim.

Q. So you thought that the procedure they would take in response to your letter would be to request copies of the debriefing records?

A. Either debriefing records or the composite of POW information in Washington someplace.

Q. So you never personally sent a request to National Personnel Records Center for debriefing records for Mr. Maxwell?

[59] A. Personally?

Q. Directly.

A. Well, yes, we did.

Q. Okay. That's what I was referring to. That's the document I was asking you to find in the file.

* * * * *

Q. Let's see. First let's start with the request. It says, "Please furnish POW debriefing records for this vet. Also send any SMR's." What are SMR's?

A. Service medical records.

Q. Okay. "Not previously furnished." Then it says, "Thanks, EA"?

A. That I don't understand.

Q. A personal description, including marks and scars, height, complexion, color of hair and eyes?

A. They were asking for a personal description of the veteran.

[60] Q. And verification of POW status from 4/1/42 to 10/30/45 and clinical records for repatriation.

Is that a computer-generated request?

A. Yes, it is.

Q. And initiated by you?

A. Whether it was me or somebody else I do not know.

Q. It could have been by a clerk, I assume?

A. Well, the clerk is the one who put it into the machine, yes.

Q. I see. And then handwritten on Paragraph 30, which is imprinted "Endorsement verification by service department," there are some handwritten notations that say POW, May 7, '43 to September—excuse me. '45. No debriefing, slash, clinical records found. Personal description not available.

Is that the report you got back from the National Personnel Records Center?

A. That's correct.

Q. And that's the center that was affected by the fire?

A. That's correct.

Q. So it's possible that his debriefing records, if they existed, could have been destroyed in that fire?

A. That's possible.

* * * * *

[61] MR. ERSAMER: Q. Does that indicate to you that it's possible that those questions were destroyed by the fire?

A. That's a possibility. If there were records available, they could have been destroyed by the fire.

Q. And that, for the record, is part of Exhibit 187.

Did you attempt to contact the National Archives Modern Military Records Section to attempt to discern whether they had any debriefing records on Mr. Maxwell?

A. No, I did not.

Q. Did you attempt to contact them on any other subject in connection with this claim?

A. No.

Q. Other than sending the letter to the Central Office—which I assume was that request for an advisory opinion we already looked at?

A. That's correct.

Q. It was May—

A. May 12th, I believe.

Q. The May 12th request for an advisory opinion?

A. Wait. That's not correct.

Q. Let's find it so the record is clear. And again for the record, we'll be referring to the same exhibit throughout the morning.

A. May 16th.

Q. Okay. Apart from that May 16th, 1983 request for an advisory opinion to the Central Office and the request to the National Personnel Records Center which we have just gone [62] over, did you do anything else to develop Mr. Maxwell's claim for multiple myeloma?

A. No.

Q. Do you have a standard protocol or instructions with regard to development of POW claims?

A. What do you mean by standard protocol?

Q. Well, do you have a special set of instructions for development of POW claims, as opposed to all the other types of claims you get?

A. No.

Q. And did you receive instructions as to how particularly to develop these types of claims as opposed to other types of claims when you receive your training to be the POW rating board member?

A. No. They're just standard development procedures that we have for all claims, trying to ensure that we get complete medical records and service records.

* * * * *

[63] Q. Do you recall approximately how much time you spent on the Maxwell claim?

A. About 24 hours.

* * * * *

[68] Q. And you have seen Mr. Maxwell, have you not?

A. No, I have not.

Q. You have never met him?

A. No.

* * * * *

[73] Q. Moving on to Mr. Maxwell's certificate of disability for discharge, dated 10 December 1947, it lists, does it not, under A—again this is signed by Mr. Spaulding, I believe. No, Mr. Erpelding, E-r-p-e-l-d-i-n-g. It's a document entitled certificate of disability for discharge. It says, "After careful consideration of all information [74] obtainable and a critical examination, we find this individual unfit for military service because of" —and they list the following: A, beriberi, residuals of manifested by numbness of fingertips, diminished vision left eye 20/200, fatiguability, nervousness and inability to concentrate. B, malaria, old, type undetermined. Blood smear negative here, positive at Fort Worden, W-o-r-d-e-n. Regimental dispensary, Port Townsend, Washington. Contracted SW Pacific. Incapacitates because of chronicity and severity of conditions.

Again that shows his diminished vision, does it not?

A. Correct.

Q. In a period in service?

A. Correct.

Q. And indeed, part of the basis for his discharge from service as unfit for military service was the fact of his eye condition, was it not?

A. That was one of the factors, yes.

* * * * *

[81] Q. It includes several other disability claims that [82] are not included in your rating decision, does it not? Why don't you just list for the record the ones that are not included in your rating decision that you referred to in your earlier testimony. Again I'm referring to Exhibit D to the Complaint.

A. Well, this VA form 41-38, dated 12/2/82, includes—what are not in our considerations are muscle spasms, Charley horses in the feet, hands, calves, thighs, chest and back. And it lists two medications that he takes. He includes chronic headaches and insomnia.

It should be noted that chronic headaches and insomnia could be symptoms of his nervous condition.

Q. Which has already been rated at 30 percent, right, the post-traumatic stress?

A. That's correct.

Q. Okay.

A. Then it mentions the optic atrophy and diminishing eyesight, with phlegm on the eyelids every morning. And it shows a medication that he takes for it. He claims he was operated on in 1947. He claims edema in the hands, feet, calves and stomach, and he lists two medications that he takes.

He claims arthritis in the lower back and shoulders.

Q. Arthritis is listed, is it not?

A. That's correct, arthritis is listed.

Q. In your rating, okay.

A. He claims extreme rashes, itching and swelling. I don't believe that is listed. He claims hey fever and sinus [83] problems, which are not one of the considerations. He also mentions malaria, for which he takes two medications.

Q. It's continued on the next page. Varicose veins is in the rating; correct?

A. That's correct.

* * * * *

MR. ERSPAMER: Q. Have you been able to determine in that break what the claim that that rating decision relates to is?

A. Okay. Based on some assumptions, it started—the initial part started when he started claiming his multiple myeloma secondary to exposure to atomic radiation. Then there is a big, long gap. And I cannot fathom why there is such a big, long gap between the time—

Q. That was in March of 1982 that you just pointed out here—

A. Correct.

* * * * *

[85] A. As far as we know, we never received that.

Q. I understand. But these particular claims for disability, such as the optic atrophy, were never adjudicated by you?

A. That's correct. We don't adjudicate claims unless the veteran raises the issue.

Q. I think the veteran has raised the issue. It's a question of what happened with this 12/2/82 document.

I take it you don't have in your file Exhibit E to the Complaint either. I didn't see it anywhere. Let me show it to you. It's another statement in support of the claim dated 1/4/83, where Mr. Maxwell said he has a pending claim, and he was scheduled for a personal hearing at the Salt Lake City, Utah office on March 17, and he reports that his claim may have been inadvertently delayed by improper action taken by the DAV.

"My statement of 12/2/82 was with the"—

A. Intent to continue his appeal.

Q. Yes. So he indicates there that he's referring to Exhibit D we already looked at, the statement of 12/2/82; right?

A. I can only assume that that's what he's referring to.

* * * * *

[89] Q. Did you ever make any effort to determine how many road miles it was from Takaoka to Hiroshima?

A. No.

Q. Have you ever been in that section of Japan?

A. I have never been to Takaoka or to Hiroshima. I have been to other parts—Osaka and places in between there and Tokyo.

Q. You have never been on the most direct route from—first of all, have you driven the most direct route from Takaoka to Hiroshima?

A. I never did any driving in Japan at all. I took either the train or the bus. And using current maps to try to decide the road mileage now would not give you the correct road mileage that was in effect in 1945.

Q. But you made no effort to consult maps extant in 1945 or now—

A. No.

Q. —to determine the road mileage?

A. No.

Q. You made no effort to consult any source to determine the amount of time it would take to travel from Takaoka to Hiroshima?

A. For exact timing, no.

* * * * *

[90] Q. But you were not present at the hearing?

A. No.

Q. So you had no opportunity to observe Mr. Maxwell's demeanor?

A. No.

Q. You had no opportunity to perceive Mr. Maxwell's conditions personally, exactly what he looked like and so on?

A. No.

Q. You had no opportunity to see Mr. Maxwell's upper right quadrant fullness?

A. No.

Q. Did you ever see a picture of Mr. Maxwell's upper right quadrant fullness?

A. No.

Q. Handing you what is marked as Plaintiffs' Exhibit 27, which is a copy of a photo—admittedly it's not the best copy in the world—you never saw this picture of Mr. Maxwell?

A. No, I did not.

* * * * *

[95] Q. Do you have any special training in how to read medical records that you received?

A. No.

* * * * *

[96] Q. In this case you can personally confirm that the doctor on the rating board reviewed all these records?

A. I did not watch him review all the records, no.

Q. Did he ever tell you that he reviewed all the records?

A. I asked him to look through the file, and he said he did.

* * * * *

[97] Q. And you assume that he had reviewed the records prior to his signing the rating?

A. Yes.

* * * * *

Q. Well, I take it from your previous testimony that he did not report back to you on any of the issues based upon his review of the medical records. Isn't that correct?

A. Okay. He did make a comment on how much the beriberi was evaluated at, the residuals of the beriberi.

Q. And was that after he reviewed the medical records?

A. That's correct.

* * * * *

[102] Q. Okay. Did you ever investigate, in Paragraph 4, the, quote, "probable explanation that his problems were due to some sort of amoebic parasitic bug that the GI's picked up in the South Sea Islands"?

A. No, I did not.

Q. Did you ever attempt to explore the cause of Mr. Maxwell's upper right quadrant fullness?

A. Personally, no.

* * * * *

[103] Q. Now, to your knowledge, did anyone else in the adjudication of Mr. Maxwell's 1982 and 1983 claims investigate the cause of the upper right quadrant fullness?

A. No.

Q. And you would agree with me, would you not, based upon a review of the medical records, that the upper right quadrant fullness has been a frequent complaint of Mr. Maxwell, dating all the way back to 1945?

A. That's correct.

* * * * *

[104] MR. ERSPAMER: Q. Here is 30 October 1947, tender area in upper right quadrant, correct, from Dr. George G. Spellman?

A. I think that's a tender area, though. I don't think the fullness comes up until much later.

Q. Well, you would agree with me, would you not, that he had problems in the upper right quadrant area consistently throughout the period of service and his separation from service, starting in 1945 to the present?

A. Per the records that are here, yes. Whether there were continuous or not, I could not speculate on that.

* * * * *

MR. ERSPAMER: Q. Although Mr. Maxwell's diary reports, does it not, consistent problems like that during this period?

A. I'll have to look back through the recapitulation.

* * * * *

[105] THE WITNESS: All right. I reviewed his reconstructed medical history. It shows him complaining of chest pains in November of '55, in September '58, August '61, June '62. And each of those times there was no diagnosis made.

He had chest pains again in September of '64. The doctor says it was possibly calcium spasms.

He had complaints of chest pains in February of '68, again in December of '69, July '70. And in August 1970 they made a diagnosis of a malrotation of the kidney, and they thought that it was something to do with, I believe, the [106] small intestine, some kind of spasm in there.

Then he had complaints in October '70, November '70, March '72, August '73. There were some complaints in January 1977, but that was in a different location, the lower left chest part area.

Then in January '82 he had chest wall pains thought to be secondary to an upper respiratory tract infection.

Then in March of '82 he had some abdominal pains. It didn't say the location, but they thought they were secondary to renal stones. And then again in August of '82 they thought the pains were secondary to kidney stones.

This is by his own list.

MR. ERSPAMER: Q. Do you have any reason to question any of the entries made in here?

A. No.

Q. Now, did you review the entries made in here in connection with your rating decision?

A. Yes.

Q. How did you treat the upper right quadrant pain aspect of Mr. Maxwell's claim in your rating decision?

* * * * *

A. I'll refer directly to the rating on which it's based. [107] We deposed of it by saying that the complaint that he had was a symptom only.

Q. What does that mean?

A. That means it is strictly a symptom. Every disease or disability usually has various symptoms. And we do not rate symptoms. We rate disease or disability entities.

Q. So the upper right quadrant fullness was a symptom of something else?

A. I don't know what it is a symptom of. We do not make medical opinions on what the symptoms belong to. That is strictly left up to doctors who are examining the veteran.

Q. Under what conditions do you generally conclude that a claim is denied on the grounds that it's a symptom only? Can you give us some other examples?

A. What do you mean?

Q. First of all, the rating decision denied the claim of upper right quadrant pain on the grounds that it was a symptom only.

A. Right.

Q. What other types of situations do you generally arrive at that reason for denying a claim?

A. Okay. Let's say that a person is in the service, and he has complaints of shoulder pain, and they can't find any disease entity. We would deny that.

Q. What tests were conducted in connection with Mr. Maxwell's claim for upper right quadrant pain?

A. I don't know.

Q. Did you know at the time that you made the rating [108] decision and you have forgotten, or did you never know?

A. That I can't answer.

Q. Can you determine from the file whether any tests were conducted for the upper right quadrant pain to try to determine its etiology?

A. All I know is that he had the standard test. There is a hematology report in the file. There is a chemistry test, called Chemistry 1 on the form.

Q. That relates specifically to his upper right quadrant pain?

A. No. This is just the general tests that they gave the veteran for the examination that they give him.

Q. Well, my question has to do with the tests that related to his upper right quadrant pain, if any.

A. They took an upper GI series.

Q. That's in his gastrointestinal tract?

A. Right.

Q. Well, that has nothing to do with the upper right quadrant fullness, does it?

A. I haven't the slightest idea. That's one reason why we don't make decisions based on symptomatology, because symptoms are just that, symptoms. They could come from a variety of complaints—or not complaints, but disease entities, just acute and transitory conditions.

* * * * *

[109] Q. Is it the responsibility of the doctor member of the rating board on any occasion to prepare the rating decision, or is that always done by a legal specialist or occupational specialist?

A. Currently it's done by the occupational or legal specialist.

Q. And not by the doctor?

A. No.

* * * * *

[110] Q. Approximately how many Statements of the Case do you produce in a month, or a range, if you can give me a range?

A. Probably from five to ten.

Q. Do they generally take longer than a rating to prepare?

A. Yes.

Q. Why is that so?

A. Because the Statement of the Case incorporates the rating itself into the Statement of the Case. It includes a summary of the veteran's history. It starts out with his service. It starts out with sort of a brief history of what has occurred in the past. Then it goes into date by date actions of the rating board, requests for records, replies from the veteran or the claimant, and then a summary of the laws that apply for whatever the claimant is appealing. Then we have a short statement on our decision, and then we have to write a summary on why we made that decision.

Q. So it's considerably more involved, the Statement of the Case, than a rating?

A. Usually.

Q. What kind of time credit do you get for preparing a Statement of the Case?

A. Let me see. I guess the best thing—we have a [111] sort of a point system. I get six points for a rating and ten points for a Statement of the Case, to give you a sort of approximate figure.

Q. What is a point?

A. That's just sort of a grading type thing that the office has developed to find out whether we're producing the correct number of cases per day or per month.

There are regulations or manuals that cover how much credit—how much time it should take for each rating, how much time it should take for each Statement of the Case.

Q. How many points are you expected to generate in a month's period?

A. We're supposed to average about six and a half points per hour.

Q. What else do you get points for?

A. We get points for review of a case, for doing development, either for requesting service medical records or scheduling an exam, supplemental statement of cases, which you're given less credit than you are for a Statement of the Case.

We get points for other types of formal ratings that we do. We have things called memorandum ratings. We have what are called confirmed ratings, which is a review of a medical document, either a hospital report or a single doctor's statement.

Q. You have deferred ratings?

A. Deferred ratings.

Q. What is the point credit for a deferred rating?

[112] A. Two points.

Q. And what is the point credit for a confirmed rating?

A. Four points.

Q. And what about a memorandum rating?

A. Five points.

Q. And a Supplemental Statement of the Case?

A. Six points.

Q. And scheduling an examination?

A. Two points.

Q. And development?

A. Usually two points.

Q. What about review?

A. Usually two points, depending on how much. If it's a simple review, basically no points. If it's a more complicated review—

Q. Do you meet the standard of six and a half points per hour generally?

A. Yes.

Q. Do you exceed it?

A. Yes.

Q. It's important in your evaluation to get a rating higher than six and a half points, is it not, points per hour?

A. Of course.

Q. What would place you in the upper reporting area for points per hour?

A. They just changed that. Usually one to two points more.

Q. If you're up around eight, you're doing pretty well?

[113] A. Yes, very well.

Q. What is the highest point ratio that you're aware of that anybody has received?

A. That I don't know.

A. What is the highest you have ever accumulated?

A. Seven and a half.

* * * * *

[116] Q. Inside this particular issue is a report of the Advisory Committee on Former Prisoners of War, pursuant to Public Law 97-37, which I believe was issued several months ago. I've got another copy of it somewhere in pamphlet form put out by Congress, but this one doesn't seem to have a date, this particular copy of it.

My question, though, is have you seen the report of the Advisory Committee of the Former Prisoners of War? I'm handing you a copy of it as reproduced in the Ex-POW Bulletin.

A. No.

Q. Were you previous to today aware of its existence?

A. No, not the details on something like that.

Q. Is there a person in the Northern California Regional Office in charge of monitoring reports of this type, making sure that people get ahold of them?

A. I can't answer that.

Q. You don't know?

[117] A. I know my section chief is steeply involved with the POW issues. So whether he is keeping track of something like that or not, I do not know.

Q. Next I'm going to just hand you four packets put out by American Ex-Prisoners of War, Inc., National Medical Research Committee. Packet 1 is "Claim Information." Packet 2 is "Stresses of Incarceration, Aftereffects of Extreme Stress, Psychological-Neurological Residual Nervous Conditions." Packet 3 is "Arthritis, Alcoholism, Visual,

Ulcer, Varicose Veins, Skin, Impotence, Brain Damage, Tuberculosis," et cetera. And Packet 4 is "The Heart, Arteries and Veins." Part 1, and "Cancer," Part 2. The main title is "The Aftereffects of Incarceration."

I ask you whether or not you have ever seen these volumes before.

A. No.

Q. Previously in your deposition I had asked you whether or not you were familiar with a report by John P. Kirchner, M.D., about liver disease in former Prisoners of War. I have obtained a copy of the report just so you could verify that you are not familiar with this, having at least seen a copy of it in front of you.

A. No.

* * * * *

[118] MR. ERSAMER: Q. Is there one of the rating board specialists who specializes in POW cases assigned to keep track of the medical literature regarding POW diseases?

A. Not that I know of.

Q. Is anybody in the Northern California Regional Office, to your knowledge, assigned the task of keeping track of literature regarding POW diseases?

A. I do not know that.

Q. Is there a file maintained at the Northern California Regional Office of medical literature pertaining to the diseases suffered by POW's?

A. Well, we have a file that contains medical literature in general, but I don't recall seeing those particular documents there.

Q. Do you recall seeing any medical reports on the incidence of disease or about diseases prevalent among ex-POW's in that file that you just mentioned?

A. No. There might be, but I don't recall seeing it.

Q. But as you sit here today, you can't recall any particular ones?

A. (Witness shakes head.)

Q. Okay. You are aware, are you not, that there is a considerable body of literature out there, medical litera-

ture, dealing with the medical problems suffered by ex-POW's?

A. I am aware there is quite a bit of literature.

Q. Is there a medical library at the Northern California Regional Office?

[119] A. Yes. There's a small one.

Q. Does it include, for example, periodicals, medical periodicals?

A. No.

Q. What does it include?

A. It includes dictionaries. It includes basic reference books concerning various diseases.

Q. Approximately how many volumes are in the library?

A. Between 40 and 50. That doesn't exclude—that excludes the basic volumes that are in each of the rating boards, which includes a medical dictionary—

Q. You're talking about extra copies of these?

A. No, no. Usually there's an extra copy of what we have in the medical library. But we have—each board has about seven or eight books concerned with medical references.

Q. Can you list a few of them for us?

A. There is the psychological book. It's called DSM-3.

Q. That's for post-traumatic stress cases mainly?

A. No. That's for all psychological problems. It's supposed to be the standard references by which psychiatrists evaluate their subject.

Then there is a medical dictionary. I think it's called Dorland's. There is a new book we just got on, I think, medical terminology, sort of a doctor's handbook.

MR. STOLL: PDR?

THE WITNESS: No. It's C-something.

We've got a two-volume general reference book on medical diseases and disabilities and stuff.

[120] MR. ERSPAMER: Q. Do you know who puts that out or what the title is?

A. No, I don't.

MR. STOLL: Not Merck's Manual?

THE WITNESS: No. We've got Merck's Manual. There is a Merck's Manual included in this.

Then there's a small volume of the psychological volume, sort of an abbreviated handbook.

MR. ERSPAMER: Q. Is that small volume put out by the VA or somebody else?

A. No, no. It's just a smaller copy of the DSM-3.

Q. So it overlaps DSM-3?

A. Well, yes. It's just a smaller, abbreviated form.

Q. Okay.

A. Oh, and then there's the pill book, the—

MR. STOLL: The PDR?

THE WITNESS: Yes. You know, the medicine book to show—

MR. ERSPAMER: Q. P-E-R?

MR. STOLL: PDR, Physician's Desk Reference.

THE WITNESS: It shows all that, current medications and what kind of side effects they might get.

Then that's just generally what's assigned to every rating board, and I have my own personal references that I bought, including my own Merck Manual and a couple of anatomy books, and a large volume of medical references put out by Besom's.

* * * * *

[121] A. Besom's.

Q. How do you spell that?

A. I think it's B-e-s-o-m-'s. Then I've got a couple of other books.

Q. What are those?

A. Ones on surgical treatment and postoperative problems.

That's about it.

* * * * *

[137] MR. ERSPAMER: Q. I take it that you have adjudicated a matter of hundreds of claims for the VA?

A. That's correct.

Q. And I take it some have been more difficult than others?

A. Yes, that's true.

Q. Can you characterize what the most difficult types of claims you have had to adjudicate are, from your own personal standpoint?

[138] A. What do you mean by difficult?

Q. Complex, hard to grapple with, hard to decide, hard to develop, any of those things.

A. Well, the hardest cases, of course, are trying to get evidence to support or deny on development on radiation claims, because it takes—it's time consuming. Post-traumatic stress disorders, it's very time consuming to develop all the information you need to make a decision.

Agent Orange are less complicated.

Some of the more complicated ones are the ones that involve special monthly compensation cases, where the person, let's say, has multiple sclerosis and diabetes, whose body has become almost overcome with a disease, or, say, an accident, say, like this case I was giving you as an example of PTS. If that becomes service connected, we have to—it's much more difficult to evaluate somebody like that, because we have to know just how limited they are to be able to write it up correctly.

When you get diseases like multiple sclerosis, they involve multiple body systems. It starts affecting their organs, procreation, their urinary and bladder abilities, their ability to use their extremities. It all requires a—to look at those particular body systems or extremities as a single entity and then try to combine it to put it together so we're paying the veteran the correct amount.

Q. Any other types of categories of claims? I know one of the other witnesses has mentioned gunshot wounds as a particular difficult claim, particularly many years after [139] the fact, with secondary problems and so on. Have you run into that problem?

A. Not especially. Usually, unless they're new gunshot wounds, once they're rated or evaluated, they're—most of the time there's a few complicating factors that come up later on. Some of the wounds in the abdominal region or to the head can become more complicated, either by becoming worse or sometimes even becoming better.

Q. But any other ones that you would characterize in the area of difficult or complex?

A. Well, one of the most difficult ones, or more complex—not so much, I guess, more complex, it's just that they require an awful lot of work—is a veteran who has been in for 20 or 25 years, and he has 30 disabilities he's claiming on his first rating, or his initial claim, because you have to look at each one and look at the service medical records and get an exam for it, and then write up the rating to itemize each one of those, say how it affects his ability to work on each one of them and put it together.

Q. Do you get any special extra credit for those multiple type claims?

A. No.

Q. You don't get any special credit for the more difficult or complex cases that you mentioned, like Agent Orange, post-traumatic stress or radiation claims?

A. No. It's sort of based on an average. They figure there's enough easy cases to sort of balance out the more complicated ones.

* * * * *

[140] Q. Well, the Agent Orange cases didn't start until after the Viet Nam war; correct?

A. Well, the Agent Orange cases are fairly simple. The only accepted disability for Agent Orange is chloracne.

Q. So they're all denied basically?

A. Not all of them, but most of them are.

Q. Are you aware of any Agent Orange claim that has ever been granted for anything other than chloracne?

A. No.

Q. That's granted based on a skin condition?

A. That's correct.

Q. And it's always rated at ten percent, is it not—

A. Not necessarily.

Q. —or usually rated at ten percent, chloracne?

A. Not necessarily. I've seen it as high as 30 percent.

Q. Post-traumatic stress cases have been a lot more frequent since it was first recognized in—what was it, '80 or '81?

A. I think that's true.

* * * * *

[141] MR. ERSPAMER: Q. And that resulted in sort of a flurry of post-traumatic stress claims?

A. That's correct. The flurry is still going on.

Q. Is it?

A. Yes.

* * * * *

[142] Q. You said earlier you spent approximately 24 hours on the Maxwell file. It threw you quite a bit off on your point system, did it not?

A. Yes, it did.

Q. Are you getting special dispensation from Mr. Verrill for that?

A. Well, they allowed me to exclude it as part of my countable hours.

Q. It's rare that you would spend 24 hours on one claim, is it not?

A. Very rare.

Q. Have you ever spent that much time on one claim before?

A. No.

Q. You testified as to several things you did during those 24 hours earlier today. Can you recall what other things you did during those 24 hours?

A. Other than drafting up several ratings, no.

Q. Were you told by anyone to be very careful on this particular claim and spend more time, or did you spend all this time completely on your own?

A. Well, I got the word that it was a special case, yes, if that's what you mean.

Q. Who did you get the word from? Mr. Hoffschneider?

A. Right.

[143] Q. What were the instructions you received from Mr. Hoffschneider in that regard?

A. To be careful, to make sure what I did was right.

Q. That was in what, May of 1983?

A. I think I first started to work on the Maxwell case sometime in April. It would have to be in April, because the first rating I did was on May 12th, and I had been working on it for some time prior to that.

Q. Well, none of your requests to the National Personnel Records Center went out until May; correct?

A. I would have to look.

I think the one to National Personnel Records Center went out, I believe, in February, and we got the reply back—it must have went out sooner than that, because we got the reply back in February of 1983. That's to the National Personnel Records Center.

Q. Were you working on the case then?

A. No.

Q. You first started to work on the case in either late April or early May; correct?

A. Well, in April or earlier.

Q. Pardon me?

A. It was in April or earlier.

Q. Can you explain the circumstances under which you came to be assigned to the case?

A. That's when we started the POW portion of the board. And that, as near as I can tell from recollection, was in March.

[144] Q. At the time Mr. Hoffschneider told you to be careful and make sure what you did was right, were you aware that this lawsuit had been filed and Mr. Maxwell was a plaintiff in this lawsuit?

A. That I couldn't say.

Q. Pardon me?

A. That I couldn't say. All I know is that sometime during the period I was working on it I became aware of it.

Q. It was after you became aware of it that you spent the 24 hours?

A. I can't answer that. I don't know.

* * * * *

[146] MR. ERSPAMER: Q. What is your understanding of the role the personal hearing plays in the adjudication process?

A. What do you mean by role?

Q. What function does it play?

A. The function for the hearing is—ideally it's for the veteran to present new evidence or additional evidence. Most of the time it is more of a public relations type mecha-

nism, for the veteran to come in and talk, and a lot of times our decisions are more clearly explained or explained in a different manner to assist him in understanding the decision.

We also provide him with suggestions on how to prove his claim.

Q. Do you find that in most cases the hearings are not used—the information presented at the hearings does not particularly sway you?

A. No, most of the time it doesn't.

Q. Most hearings come after a Statement of the Case has been prepared?

[147] A. That's correct.

Q. In fact, it's a local policy of the Veterans Administration in San Francisco not to provide a hearing until after a Statement of the Case?

A. Yes. They will allow the claimant to know what the decision is, what it's based on, the laws on which it's based. That way the claimant has the knowledge to come to the hearing informed.

Q. That is the policy; correct?

A. That's correct.

Q. How has that policy been communicated to you?

A. What do you mean?

Q. How did you first learn that that was a policy?

A. It's been the policy ever since I've been there.

Q. Is it written down somewhere that you know of?

A. That I couldn't tell you.

Q. 38 CFR provides that a claimant is entitled to a hearing at any time on any issue; correct?

A. That's correct.

Q. And the local policy is more restrictive than that; correct?

A. Usually, yes.

Q. Do you—

A. You know, it's not set in concrete. If the veteran insists or the claimant insists, then they can have a personal hearing. But as a matter of course, we find it's better for the claimant to come into the hearing informed about what we based our decision on, the laws that are [148] involved

in the decision and why we made the decision. Then they can come in with their arguments against it or come in and ask educated questions on how they can prove their claim.

Q. Do you recall receiving a handwritten note or memorandum from Mr. Verrill regarding the subject of when hearings ought to be provided, which said something to the effect that hearings are not to be provided before the Statement of the Case in, quote, all but the most unusual cases?

A. I don't recall any such message. There may have been one.

Q. Do you recall your section chief ever having explained to you that that would be the policy locally?

A. No. They may have. But that's been the policy since I've been there. So if they said anything about it, it was just—it just reinforced what I already knew, and I wouldn't pay particular note to it.

* * * * *

MR. ERSPAMER: Q. Let me hand you what has been marked previously as Exhibit 17-137 to 17-138 in the Verrill deposition and ask you whether you have ever seen the original or a copy of that particular document before.

A. No.

Q. But the policy expressed in there is consistent with your understanding of the local policy?

A. Yes.

Q. Is that policy still being applied today?

A. Yes.

* * * * *

[150] Q. It's difficult to work with the materials without developing your own cross-referencing system?

A. That is true.

Q. And that's because there are a lot of different sources of substantive and procedural standards?

A. That's correct.

Q. And it can be found in all kinds of different things, including what, circulars?

A. Circulars.

[151] Q. Procedural manual?

A. That's the M21-1.

Q. Right.

A. And the regulations.

Q. The regulations themselves. They're also in adjudication memoranda locally?

A. Yes.

Q. Do you maintain a set of those?

A. Just the ones concerning me, yes.

Q. Those are received from Mr. Verrill generally?

A. Yes.

Q. And there is the M1-1 manual. Is that a procedural manual?

A. M21-1?

Q. No. M1-1.

A. I don't know what that one is.

Q. Are there any other manuals that you turn to as a source for rules?

A. I have a rating board training manual that tries to explain how we should rate individual types of disabilities. And then we have the rating guide—rating schedule it's actually called, which tells the diagnostic codes and the criteria for the percentages for each of the disabilities.

MR. STOLL: Is that in the CFR?

[152] THE WITNESS: Yes.

MR. ERSPAMER: Q. You have never heard of the field appellate procedures manual, M1-1?

A. Oh, yes.

Q. Is that another one?

A. It's not one that's handed out to the rating board members. I have a copy of it.

Q. Have you ever had occasion to refer to it?

A. Yes.

* * * * *

Q. Do you ever have occasion to get into the work history of claimants that file claims?

A. That's part of what we use for some of our judgments, yes.

Q. Do you find that a substantial number of claimants have gone through periods of unemployment in the past?

A. Some of them have, yes.

Q. And a substantial number of them are currently unemployed?

A. I couldn't answer that.

Q. Well, you get a lot of unemployability claims; correct?

A. Yes, we get a number of unemployability claims.

Q. And they're usually filed by people who are not currently employed; correct?

[153] A. Usually, yes. We have people who file for unemployability who are still employed.

Q. Do you have a rough idea about what kind of percentage of unemployability claims you get?

A. No.

* * * * *

[155] [Q.] Have you ever sent out an unemployability case for an advisory opinion?

A. Yes.

Q. It's more trouble to send a case out for an advisory opinion?

A. Very definitely.

Q. Do you have to get approval from your section chief to do that?

A. No, I don't have to have approval. It goes through him, and he makes sure that I have all the information necessary to support my submission for individual unemployability.

Q. Is anybody's approval besides your own necessary in order for that to go out?

A. No.

Q. Now, in the area of disability compensation claims, the vast majority of people who file have some disability? The query is whether it's service connected or not, but the vast majority of people have some disability; correct?

A. That's correct.

* * * * *

[159] MR. ERSPAMER: Q. Do you recall any instance in which you initially denied a claim by means of a rating and the [160] claimant has requested a hearing, and as a result of the information presented at the hearing, you changed your mind?

A. Until the last hearing I had, I would have had to say no to that. The last hearing I had, after I get the hearing transcript back, I'll probably order a new exam.

Q. That would be based upon what, an inadequacy in the record?

A. Sort of what I consider a discrepancy between the psychiatric evaluation and the symptomatology the veteran exhibited at the hearing.

Q. The symptomatology displayed by the veteran at the hearing indicated to you a problem more serious—

A. Yes.

Q. —than that shown in the psychiatric evaluation?

A. Yes.

Q. But other than that instance, you can't recall another instance in which you have changed your mind after a personal hearing?

A. Changed my mind?

Q. On a rating decision.

A. No.

* * * * *

[163] Q. Have you ever sent an atomic veteran—by that I mean an atomic radiation claimant—to a VA facility for an exam to determine whether or not the disease he suffers from was radiogenic in origin?

A. I don't recall ever doing that.

Q. Have you ever sent such a claimant to a private physician for a medical opinion?

A. No. We're not allowed to do that.

Q. You're not allowed to do that?

A. No. Any kind of private medical opinion, we would request the opinion from the hospital, and they would go out to the appropriate medical facility or medical doctor to request that opinion.

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VOLUME 1
DEPOSITION OF THOMAS H. JACOBSON
October 21, 1983
(CAPTION OMITTED)

[2]

* * * * *

MR. ERSAMER: Q. Please state your name for the record.

A. My name is Thomas Hughes Jacobson.

[3] Q. And you are an attorney; is that correct?

A. That's correct.

Q. What year did you graduate from law school?

A. 1981.

* * * * *

[4] Q. Okay. When were you first employed by the Veterans Administration?

A. I was hired in September 1972 in Philadelphia.

Q. What position were you hired as?

A. GS-5, adjudicator claims examiner.

Q. What was the address of that office?

A. 5000 Wissahickon, W-i-s-s-a-k-i-o-n, I believe, something like that, Avenue, Philadelphia, Pennsylvania.

Q. Is that the Philadelphia Regional Office?

A. Yes, it is.

Q. Can you briefly describe the job functions of an adjudicator claims examiner in that office?

A. Initially I was trained to process and award benefits for education claims. After about six months to a year, I was trained to award benefits in compensation and pension claims. And I stayed in that position and rose through the ranks until I got onto the rating board, where I have been since April 1977.

* * * * *

[6] Q. Can you describe the functions you perform as a rating board member.

A. Well, it's my job to decide whether or not veterans are entitled to compensation for service connected disabilities. It is my job to decide whether or not veterans are entitled to nonservice connected pension because they're per-

manently and totally disabled. It is my job to decide whether or not widows and orphans are entitled to pension if the death of the veteran had been due to service connected reasons.

[7] There are a number of other benefits that we adjudicate, but generally they fall within those parameters.

* * * * *

[8] Q. Just roughly, how many ratings do you participate in in, let's say, a given year or a given month?

A. Well, generally I write about six or eight ratings a day. And I suppose if we multiplied that out, we could find out how many in a year. I suppose we work about 20 days a month, 12 months a year. Let's say 11 months. 220 days times six or eight is a thousand.

And then it's my responsibility to sign off on ratings that other people write. So I probably sign off on another thousand of other people's that it's my responsibility to review and ensure that they're as accurate as the ones that I would write.

* * * * *

[10] Q. Now, you mentioned that the rating board is composed of an occupational specialist, a medical specialist and usually a legal specialist. What are the requirements for the position of a legal specialist?

A. You must be an attorney. I understand you must be an attorney. Before I was an attorney, I was an occupational specialist.

* * * * *

[15] Q. How frequently in cases you have handled has the claimant been unrepresented, in other words, represented himself or herself?

A. I don't know that I could assign a percentage. It's at least 25 percent that do not have representatives, I would think. Maybe I'm wrong.

Usually I don't look at it other than just to fill in that box at the bottom of the ratings or to give the service representative a copy.

I have noticed that recent military retirees tend not to have a service representative, but there is no other pattern that I can see.

Q. Can you just describe the frequency with which attorneys are involved here in the Regional Office, in your experience?

A. Very rarely, other than Swords to Plowshares. We occasionally get an attorney who is doing a favor for some veteran, trying to help him, or some widow.

* * * * *

[19] Q. You also mentioned that the fairness of the fee limitation was the subject of discussions among members of the rating board. Can you describe what those discussions were?

A. Well, I don't remember anything specific, other than the fact that we talked about it. People who are not attorneys generally don't have the high regard for attorneys that those of us who are have for attorneys.

I do recall discussing with Judy Kephart of the California Department of Veterans Affairs the merits of having attorneys represent claimants.

Q. Was this recently?

A. Yes. It wasn't too long ago.

[20] Q. What did she have to say on that subject?

A. Well, she's a service representative, and she felt that on the cases that had merit, that the service representatives were able to adequately provide representation but that they did have a tremendous work load and that they weren't allowed to choose their clients.

Q. And did you respond?

A. Yes. I told her that I felt that in a number of cases that the veterans would be better off having attorneys represent them, because I felt that they would possibly get a fairer shake.

Q. In saying that, were you calling upon examples from your own experience as a rating board member?

A. Well, I think that all of us who have worked at the rating business for any length of time have seen cases that we would not have done in the same manner. And these cases range from matters of judgment to matters of error.

I think that if a case goes to the Board of Veterans Appeals, that the veteran will get the fairest shake possible. I think if the case is adjudicated in the Regional Office, that in the main the case will be well rated but there will be the exceptions to the rule.

Cases that I rate and take part in, I make every effort to give the veteran what he's entitled to under the law.

Q. Now, you said you have seen cases that you would not have done in the same manner and they range from matters of judgment to matters of error.

What matters of error have you seen in the adjudication [21] process with respect to veterans represented either by service organizations or representing themselves? Can you give us some examples?

A. Well, I have seen cases where service connection was denied and it should have been granted. I have seen cases where we overpaid the veteran due to an error on our part, either some form of pyramiding of the disabilities or in one case I saw we exceeded the amputation rule.

I have seen cases where I felt that service connection was granted in error, and I have severed service connection.

The rating process is done by human beings, and errors exist. And many things are matters of judgment.

* * * * *

[22] Q. Then in cases where it's not shown in the service medical records or within the presumptive period, the claimant has the burden of showing that the particular condition he has was caused in service, was the result of something that occurred in service; right?

A. Could you rephrase that?

Q. Sure. In instances where the service records do not show the condition while he was in service and there is no manifestation of it within one year, the one-year presumptive period, the claimant has the burden of showing the connection between something that happened in service and the current medical condition he has, in other words, the [23] burden of causation?

A. Well, I think that this would apply in a number of types of cases. One that comes to mind is post-traumatic

stress disorder. The veteran during service has a stresser probably a combat incident, and then many years later has a diagnosis of post-traumatic stress.

Yes, if the cause is shown during service, we would certainly service connect.

Q. But the claimant has the burden of showing that connection, in proving to the Veterans Administration that there is a connection there between that stress and the current psychological condition he has in the case of post-traumatic stress?

A. Are you talking about the legal burden of proof?

Q. Well, the burden of proof in the adjudication process. In other words, if he doesn't introduce any evidence on it, you can't grant service connection; correct?

A. Correct.

Q. So he has the burden of coming forward to show that connection?

A. Yes. But if we have some evidence, it is then our job to decide if service connection is warranted.

* * * * *

[25] Q. What types of things do you think you as an attorney in general could do better than the service representatives, in your experience? And I understand you don't want to criticize them, but I'm just concentrating on what you feel you as an attorney could do better than an untrained service [26] representative.

A. Well, I think that there are some cases that are denied because all the evidence hasn't been obtained, and other cases I think are denied because some rating specialists misinterpret the law.

I think an attorney can argue the law much better than a lay person. Of course, an attorney could amass a much better brief of the facts of the case than a lay person could, I would think.

The quality of the service representatives varies. Some are very good and do very good jobs, and some are not quite so good.

Q. And a lot of the service representatives who are in the good end of the scale, or the better end of the scale, are very busy. Is that correct?

A. Yes. They have very large work loads.

Q. They can't do all the things that they would like to do, if they had more time, in the way of development?

A. I assume that in the cases that they believe are meritorious, that they make every effort. In the cases that they suspect they can win, I would think they work harder than the cases that they think they would lose. That's what I would do.

Q. Has any service representative ever commented to you about the fact that their work load is very heavy?

A. Yes.

Q. And has any service representative ever described his work load specifically to you, in terms of how many cases [27] he was handling or how many claims he was handling, he or she?

A. No, I don't recall any specifics. It's just a well known thing that everyone that deals with the adjudication of benefits, whether it's the rating board or the claims examiners or the service representatives, we do a tremendous number of cases.

Q. And you would agree with me, would you not, that in a case where the service representative or the attorney or the claimant does a lot of the workup on the case—for instance, secures buddy statements and goes out on his own and gets all the medical records, puts it all together and writes a brief and so on—in those circumstances it makes your job easier, does it not?

A. Oh, yes. It does, yes. It's always easier to find entitlement if it exists. And if the case is well briefed and well prepared, possibly entitlement does exist.

Q. Do you normally receive a written brief of facts and law and an interweaving of the facts in the nature of what an attorney would do?

A. The only one who ever gives that to us is the Swords to Plowshares. And, of course, that's because they're attorneys.

Q. And the service organizations do not do that?

A. No. The service organizations do occasionally give us a memo as to their arguments in the case, particularly if the case is on appeal.

* * * * *

[28] Q. Approximately how many hearings do you participate in on a monthly basis?

A. Well, of course, it varies from month to month. But I think this month I have four or five. Generally it's four or five, one a week or so. Actually, many of them are cancelled. So it may be one or two a month actually show up.

Q. And is that, according to your information, a fairly average number of hearings for someone in your position?

A. Yes, I think so. We don't have a lot of hearings.

* * * * *

[29] A. Well, these hearings are nonadversary. The purpose of the hearing is to allow the veteran to present his evidence, present his story in his own words. And generally that's about the size of it.

Generally it's at the end of the appeal stage where we have decided over and over we're not going to grant the benefit, and the case is almost ready to go to the Board of Veterans Appeals.

* * * * *

Q. Do you have any explanation as to why there are so few hearings?

A. Well, I suspect the service representatives don't want to have hearings where there is no real additional evidence to be presented. So therefore they only have [30] hearings where the claimant insists on it or where they think the decision is particularly outrageous in the light of the evidence of record.

Q. It is the local policy, is it not, generally not to schedule hearings before a Statement of the Case?

A. That's my understanding.

Q. Do you recall receiving a memo from Mr. Verrill, a handwritten memo from Mr. Verrill to that effect approximately a year ago?

A. I don't specifically recall that, but it certainly could have happened. It's helpful at the hearing to know what the issues are and to have the claimant have some idea of why we're denying the benefit and what the laws are that apply.

Q. What is the source of your understanding that the local policy is not to schedule hearings before a Statement of the Case?

A. Well, I think this applies to rating board decisions. On the character of discharge and other things, like competency, of course, a hearing would be scheduled beforehand if desired.

Q. What is the source? Who told you about this policy? If you read it, where did you read it?

A. Well, it has been a long policy for years that we would try to give him a Statement of the Case first and then schedule the hearing. And recently we had some paragraphs added to our standard paragraphs to put into the Statement of the Case at the end of it to describe to him why the hearing [31] was in order to make sure that he did indeed want a hearing.

* * * * *

[32] Q. Handing you what has been marked previously in the Verrill deposition as Exhibit 17, and directing your attention particularly to 17-137—I'll take the sticker off here—have you ever seen the original or a copy of this handwritten memo before? And please take time to read it to acquaint yourself with it.

* * * * *

[33] A. Well, at this time I don't recall seeing this memo. But for years this has been kind of an unwritten policy, that we would try to give them a Statement of the Case first.

Q. So there is nothing in there that shocks you?

A. No, no.

Q. Or that's inconsistent with the policy as you are acquainted with it?

A. No.

* * * * *

[40] Q. It's a document on VA form 21-526 entitled "Veteran's Application for Compensation or Pension." Is that correct?

A. Yes, that's correct.

Q. And it has a stamp indicating it was received on May 3rd, 1983?

A. Yes.

Q. Turning to the second page in the back, on item 24 under the caption Nature of Sickness, disease or injuries for which this claim was made and day each began, there is listed in handwriting, lung problems, dash, 1973?

A. Yes, that's correct.

Q. And the veteran's name is—or signature is under item 41 on the back of the second page?

A. Yes, that's correct.

Q. And this form was apparently filled out by the veteran himself?

A. It appears so.

Q. It's all in the same handwriting.

A. Yes, it appears so.

* * * * *

[41] Q. I see. Did anything else in this particular claim accompany the form claim that is the four pages we have just referred to?

A. Yes. Also the veteran sent in a form 4138 wherein, I believe, he alleges—yes—that he was exposed to Agent Orange and that it's his opinion that his lung problems are due to that exposure.

Q. And you are referring to a one-page form that is immediately above the application for compensation and pension in the file entitled "Statement in Support of Claim," dated April 20, 1983?

A. Yes.

Q. If I might read into the record, the claimant writes in apparently his own handwriting, "I wish to file a claim for service connection for lung problems. My problem did not start until I was out of service. However, I have been exposed to the herbicides and"—he apparently misspells it—"defoliant while on active duty in Viet Nam, and my problem started shortly out of service, and there is no history of this problem in my family, nor did I have this problem prior to entering into service.

I contend this is a result of something while I was in the service and could be awarded service connection on a presumptive basis"?

A. Correct.

Q. "Presently I am being seen at the VA OPC in Sacramento, California"?

A. Yes.

[42] Q. What does OPC stand for?

A. Outpatient clinic.

Q. There is nothing on this statement which indicates that the service organization participated in its preparation, is there?

A. Not to my knowledge. They may well have helped him fill it out. The form 2322 was filled out the same day.

Q. What is a form 2322?

A. This is the appointment of a power of attorney or the service representative. It does—one could conclude by looking at these forms that the service representative did indeed help the veteran do this, since it was done on the same day.

Q. But you really can't tell by looking at the form that the service representative assisted, correct, or can you?

A. I don't see any stamp from the organization.

* * * * *

[43] Q. Then on the appointment of service organization as claimant's representative, that's in the right-hand file; correct?

A. Yes. It does say up here, abbreviated, "Acknowledged" on 5/5.

Q. '83?

A. Yes. A-c-k:

Q. What does that mean, that the service organization acknowledged that it was representing the claimant?

A. No. I think the VA acknowledged that a power of attorney existed for this veteran.

Q. It doesn't indicate any particular person is representing the claimant?

A. No. Just the organization.

Q. Is that typical?

A. Yes.

* * * * *

[47] Q. You have some reports there that are in the file. The next thing is the rating decision.

Now, in connection with this particular file, did you consult with a medical specialist with regard to the question of causation before the rating decision was issued?

A. As I recall, I did not talk to Dr. Rockwood before I wrote the rating. However, when he was signing it, I talked to him about it, and he felt that the decision that I had made was correct. And we discussed the problem medically with—these recurrent pneumothoraxes. And I think we may have discussed his childhood asthma also.

Any relationship it might have had with Agent Orange, medical principles recognize that Agent Orange causes chloracne, which is a skin condition. To this point in time medical science has not related any other condition to Agent Orange.

Q. It's true, is it not, that the policy at the [48] Regional Office here is to deny Agent Orange claims unless they're related to chloracne?

A. Yes. There is no sound medical basis for any other decision.

Q. And in connection with this particular claim, did you review any medical literature with regard to the question of causation between Agent Orange exposure and the types of problems this veteran was claiming were association with his dioxin exposure?

A. No, not in this case. I dealt with many Agent Orange cases, and I knew the policy, and I knew what sound medical principles dictated. So I didn't have to research it, no.

* * * * *

[49] Q. The policy that you earlier referred to with regard to Agent Orange exposure is communicated in the letter to the effect that, quote, "The only condition recognized as caused by exposure to Agent Orange is chloracne"?

A. Yes.

* * * * *

[54] Q. And this particular claim was for what?

A. Well, he claimed many things. He claimed service connection for headaches, defective vision, residuals of hepatitis, residuals of shell fragment wounds to the head and

other places, and any disability due to Agent Orange exposure.

Now, a number of these issues had already been resolved [55] by the rating dated June the 1st, 1971. And it fell to me to resolve additional issues and to restate the previous denials.

Q. And in addition deny the Agent Orange claim?

A. Yes. He had no chronic skin condition. He did not have chloracne.

Q. So that was basically a fait accompli?

A. Yes.

Q. Again looking through this, can you page through the middle portion of the file and determine whether or not a personal hearing was held in this case?

A. There was no personal hearing requested.

Q. I see. Can you isolate the original claim having to do with the most recent claim that was filed in 1983?

A. Well, here in a claim dated 2/16/83, a form 526. I believe that was his claim.

Q. Is that signed by the veteran, or is it signed by a service representative?

A. Well, it's signed by the veteran. It was signed the same day as the power of attorney was given to the CDVA.

Q. Suggesting that he had assistance in preparing the claim again, as with the other case?

A. Yes. It was typed on the same day, and medical evidence was submitted along with marriage certificates and birth certificates. So it would appear that he did have help from the CDVA, apparently the Yolo County Veterans Service Officer where the veteran lives, in Woodland.

Q. Do you know who that is?

A. No, I don't.

[56] Q. Is there any way you can determine who that particular person is from the file?

A. No, not to my knowledge

* * * * *

Q. Was there any private medical opinion submitted in connection with this claim?

A. Well, there were medical statements which are here of record.

Q. Those are medical records, correct, of treatment and so on?

A. Yes.

Q. But there is no medical opinion specifically submitted on the question of whether or not Agent Orange exposure caused the problems the claimant was seeking service connection for?

A. No. We obtained from the VA medical center in Fresno an Agent Orange exam, which is the VA protocol to try and identify all veterans who think they have some disease due to Agent Orange exposure and keep a record of their names in case medical science ever determines that Agent Orange exposure does indeed cause something other than chloracne.

* * * * *

[58] Q. You are referring to a rating decision dated March 23rd, 1983, about a third of the way down the file?

A. Yes. Let's see what he claimed on his original application.

The original application was filed August the 6th, 1982, on campus. Apparently the veteran was going to school somewhere. There is no service rep here. And he claimed various problems stemming from Viet Nam.

I don't see anywhere Agent Orange. Do you?

Q. I see the nature of sickness in item 24. That's where [59] it would probably be, would it not?

A. Yes.

Q. He has listed there 1969 to 1971 in Viet Nam, and he lists stomach ulcers, jungle rot, skin rash, kidney involvement, right foot and back.

Some of those might be Agent Orange related; correct?

A. But he doesn't specifically say due to Agent Orange. That was my point.

* * * * *

Q. In paging through there, do you see any evidence [60] that a hearing was ever held in this case?

A. No. There was no hearing requested or held.

* * * * *

[63] A. I think in this case, when I saw the veteran's original claim, I presumed that he was claiming Agent Orange exposure. He didn't actually state it, as we noted.

Q. And the original claim, that was dated sometime in August of 1982?

A. Yes.

Q. Now, you don't see any evidence in this file that a private medical opinion was furnished?

A. No, no.

* * * * *

[65] Q. I just wanted to cover briefly the method by which you chose those three Agent Orange files this morning. You just picked those out randomly among the files you have worked on, the Agent Orange files; is that correct?

A. The adjudication officer's secretary had a folder filled with requests for Agent Orange examinations. These requests were sent to the hospitals. And I looked through those and picked by terminal digits ten cases that had been in digits that I had had. And then I went to the files and found those three. They were the only three I could find.

I was informed that this was necessary at 15 minutes to 9:00, and I complied by 9:15.

Q. That's fine. I was just wondering the process you went through.

So they were more or less randomly selected?

A. Yes, randomly.

Q. And in your opinion, they are representative of the files, Agent Orange files, that you have worked on?

A. Absolutely.

* * * * *

[67] MR. ERSAMER: Q. Why don't we take the first one and open it up. It's again the same kind of file we discussed this morning, with three overleaves; correct?

A. Yes.

Q. There is actually one loose page here.

A. That's a letter to the veteran.

Q. Should that be in the center here?

A. Yes, right there.

Q. Is there anything on the left-hand side of this first file which has been marked as Exhibit 180 that relates to a service connected death and disability compensation claim?

A. No, nothing whatsoever.

Q. Then what about the right side?

A. On the right the veteran was represented by the Disabled American Veterans.

Q. We'll have that copied and take that.

Move down, if you would, to the place in the file where the atomic radiation claim was initially filed, and take a look at the initial filing.

A. In 1975 the veteran was entitled to nonservice [68] connected pension due to rheumatic heart disease.

Q. Okay.

A. In 1979 the veteran filed a claim on August the 20th alleging that exposure to radiation produced heart problems and fatty tumors.

Q. You're reading from item 24 of the original claim, which bears a received stamp of October 31st?

A. Right.

Q. Actually it bears several stamps: October 31st, August 30th, and it looks like August 8th, three different stamps.

What do the three different stamps indicate to you?

A. These stamps are from different Regional Offices. One was the Regional Office in Portland, one here and a second one from here.

Actually the veteran signed this on September the 24th. Maybe he sent it in once and he forgot to sign it and it was sent back to him, maybe.

Q. I see. Okay. Can you tell from looking at the file what was submitted with the original claim, whether a statement was or affidavit or anything like that?

A. It looks like just the original claim. However, there was a letter here that the veteran said he was exposed to radiation at Desert Rock, Nevada, in 1955.

Q. That's below the claim there on a form that's called what?

A. This is a 96 letter, FL 96. And we sent this to the veteran and asked him to finish completing the VA form [69] 526. He forgot to sign it.

We also asked him to tell us the date on which he was exposed to radiation. And initially he wrote, "No one told me I was exposed to radiation. Check service records for dates." Then someone else wrote in red ink, "Desert Rock, Nevada, 1955."

Q. Can you tell from comparing the original claim to the appointment of the service representative with a power of attorney to the right there whether or not they were filed coincidentally?

A. It appears they were filed about the same time. The appointment of the service rep was done on 9/5/79.

Q. What happened next, after that claim was filed?

A. Well, we asked the veteran to tell us where he was exposed to radiation. We actually sent him two letters. One was November the 9th, 1979, and one was November the 26th.

Q. The November the 26th letter, this is a standard form letter used in all the ionizing radiation claims asking for information, is it not?

A. Yes. I believe that was the standard form at that time. I think what happened here is that—well, then the veteran answered.

Q. We see some handwriting written by, it looks like, the veteran's wife, some notes?

A. Mm-hmm.

Q. What is this, another form?

A. He filed another original application and said the same thing, that his heart problems were caused by atomic [70] tests.

Q. Is that signed by the veteran?

A. Yes.

Q. And that's dated 2/26/80?

A. Yes.

Q. The file doesn't reveal any action on his original claim in between the dates of those two filings?

A. No.

Q. Is that kind of odd, that he would file another claim for the same thing?

A. Well, it may have been that the Regional Office took the end product when he failed to respond within 60 days.

Q. So the file was closed?

A. Yes.

Q. What is the period of time intervening between the date of the request for information—that's what? 11/26/79?

A. Then they took the end product on 1/31.

Q. That's shown in ink on the request letter, by the indication in ink, "No reply, 120-C, 1/21/79"?

A. Yes.

Q. They closed it 60 days later?

A. Yes.

Q. What is 120-C?

A. That's just the end product, 120.

Q. Okay.

A. Then he filed another claim just a few days later. So then the process started again.

* * * * *

[71] Q. After the second claim was filed on—what is the date of that?

A. 2/26/80.

Q. Okay. What was submitted in connection with that claim in addition to the regular form? Is it just a little note from the veteran's wife?

A. Yes.

Q. "We are sending everything to you and certainly hope you will be able to help us"?

A. Yes.

Q. And that's written in hand on a half page.

Then what comes next here? An acknowledgement of the receipt of medical records; right?

A. Yes.

Q. That's dated January 29, 1980.

A. I think what happened here is he sent in this form without his claim number

Q. Without his prior claim number?

A. Yes. So they couldn't identify it. No; he sent in these records, and they couldn't identify it, so they sent it back to him and gave him this form. So he sent the form in.

* * * * *

[74] Q. This looks like another letter—

A. Another letter from the veteran.

Q. Dated 1 November 1982. And he says, among other things in there, "It has been almost a year since your letter. I would like to know what the problem is regarding my service records. I know that a lot of it is classified, but something must be done fairly rapidly. Do you need any more information from me?"

He also says, "I understand there is a new test out involving the chromosomes that show residual radiation exposure. I am certainly ready to think about this test. Do you have any information regarding this test? Please reply as soon as possible as time is of the"—I believe that's supposed to be "essence," but it's misspelled.

* * * * *

[76] Q. Before we get into that and I show you that Program Guide, did you rely upon any medical opinion in making this rating decision?

A. None other than just sound medical principles.

Q. Well, I'm not asking whether you applied medical principles. First of all, you are not a doctor, are you?

A. No. But a doctor signed it and agreed.

Q. Who is the doctor that signed it and agreed?

A. Dr. Cerber.

Q. What is his training?

A. He's an internist.

Q. Does he have a specialty?

A. No.

Q. Is he just a general practitioner?

A. Yes, that's it.

* * * * *

[77] Q. Is it your consistent practice to discuss a rating with the doctor, the medical conclusions, at least, part of it that you reach in a rating decision before you sign it?

A. No. Due to my experience on the rating board, if I know what the answer is, I go ahead and write a rating, and if the doctor thinks differently, he'll tell me so.

Q. So you just assume if he has a difference of opinion, he'll bring it to your attention?

A. Yes.

Q. In some instances he will perhaps sign off on a rating sheet like this without there having been any direct consultation between you?

A. Yes.

Q. I see. What is the procedure you would go through on rating decisions you're responsible for? Would you sign it yourself and route it to him somehow?

A. Well, we all work closely together, within just a few feet.

Q. I see. So you would just—

A. I would date it and sign it and give it to the other person, and he would look at it and sign it. Then he [78] would put it on the doctor's desk. This doctor works half time, so when he comes in, he signs off on the ratings we have accumulated.

* * * * *

[80] Q. Have you ever requested an independent medical examination in an atomic veteran case?

A. You mean by someone other than the VA?

Q. Correct.

A. No.

Q. Someone outside the VA?

A. We only order examinations by the VA Hospitals. I understand the Board of Veterans Appeals can request an independent review. It may well be that we have a procedure to do that ourselves. I have never heard of anyone doing it.

Q. Have you ever referred an atomic veteran to an expert in the area of radiogenic diseases for a medical examination? And I am referring to a VA expert.

A. At this time I can't recall ever doing that, no.

* * * * *

[81] Q. What is your understanding of what a reconstructed dose means?

A. Well, I believe what they do is try to find some record of some individual in this man's unit for whom they have a dosage based on the badges that they wore during that primitive time, and try to speculate as best they can as to how much he was exposed to.

Q. That would reflect the gamma radiation, when you're speaking of the dosage that is referred to there, the .44 rems?

A. I have a little chart at my desk that tells me how significant are the rems or the rads that the person was exposed to. I don't keep that information in my head. I understand this is a small amount.

Q. I'm just talking about generically. When you get these readings, it refers to the amount of gamma radiation as opposed to beta, alpha, alpha emitters and other types of radiation. Is that your understanding?

A. I am not particularly knowledgeable on the different types of radiation.

[82] Q. So you don't know what that's referring to?

A. No.

* * * * *

Q. Under the arrangement that the VA apparently has with the Defense Nuclear Agency, the only information you receive is the reconstructed dosage reading, or in the case of an individual film badge, the film badge readings?

A. Yes.

Q. And you get no information as to how to deal with other sources of possible radiation exposure from the DNA?

A. Well, I think that you have to recognize that these radiation cases are few and far between, and reach is dealt [83] with on an individual basis.

Q. My question is whether you get any information from the Defense Nuclear Agency when you make a request for exposure information with respect to ingestion, inhalation, or exposure from other sources.

A. I don't know.

Well, I take that back. I have seen cases where we have been able to obtain actual radiation exposure by dates. These are recent veterans, not atomic veterans, but recent veterans aboard ships. And they have a specific form for it that the military uses.

So I suppose that the defense establishment that you were discussing could furnish such an item.

Q. I'm limiting my question to atomic veterans. You have never seen any information from the Defense Nuclear Agency that takes into account exposure from anything other than external gamma radiation, have you?

A. No.

Q. Do you currently have any active atomic veteran cases that are under consideration for ratings?

A. I may have some. We don't keep cases on log or on diary as you might in a law firm. We develop them and send them to the clerks, and eventually they come back to us.

Q. So you don't have, for instance, a file of active cases inside your office?

A. I'm sure we have some. I just don't know the numbers.

Q. I mean in your particular office, where your work [84] station is. Is that correct?

A. I don't have any there that I know of.

Q. It's true, is it not, that for many atomic veterans, dosimeter readings are not available?

A. That has been my experience.

Q. Have you had difficulty in many cases obtaining service records for these individuals, medical records?

A. Well, in many cases these are World War II and Korean War veterans whose records were destroyed in the fire at the National Personnel Records Center in St. Louis, if there ever were any records. And I understand that when they did these atomic tests, that not everyone wore badges as they should. No one understood the seriousness of the possible effects of radiation at that time.

Q. And given the long period of time since the exposure, it's kind of difficult, you would agree, to reconstruct the actual dosages received?

A. Well, I have no way of knowing. I can only speculate on that. That's beyond my province really.

Q. So you basically, as regards the radiation exposure levels and so on, rely upon the Defense Nuclear Agency?

A. That's the only evidence that we receive.

Q. And it's true, is it not, that you're not allowed to turn to any other source for information besides the Defense Nuclear Agency? Your instructions are to rely upon the information of the Defense Nuclear Agency?

A. Well, I don't know who else there is to go to.

Q. But your instructions are to rely upon them?

[85] A. Yes. We have a procedure that we go to the military and ask them.

Q. Now, that takes us up pretty close to the top, if we might continue on in the file. Where were we when we left off here? A letter to the veteran, I believe, and then the additional reports.

It looks like a microfiche copy next, dated April 28th, 1955, which lists the veteran's name on it, does it not?

A. Yes.

Q. Do you know where that was obtained from?

A. I think that all of this came in together from Max Woodall.

Q. I see. Okay.

A. It's the final reply on the attempt to document the veteran's exposure.

Q. Okay.

A. And the rating board looked it over and decided that the previous decision was correct, that entitlement to service disconnection for rheumatic heart disease was not one of them.

Q. I believe in your initial rating decision you found that there was no evidence of tissue—what is it?

A. Fatty tumors, he claimed.

Q. What was your conclusion based upon?

A. Well, he hadn't furnished any medical evidence that fatty tumors existed.

Q. Was any hearing held in this particular case?

A. No hearing was requested, and none was held.

[86] Q. I see. Do you recall receiving any private medical opinion in connection with this case?

A. No, no private medical opinion.

* * * * *

[87] Q. Again, if you would move down to the original claim file—

A. Okay. The veteran filed the original claim on June the 22nd, 1982. He claimed a number of disabilities, including exposure to radiation in 1954 and exposure to Agent Orange. He claimed heart disease, malaria. He said he had chloracne due to Agent Orange. He said he had cysts.

Q. Did he file that claim on his own, or did he have a service representative's assistance?

A. He had no service rep.

Q. That's again on the standard form, 21-526, bearing the two stamps received June 22nd in the Veterans Hospital?

A. That's the hospital in Palo Alto.

Q. And then it was referred up to the Regional Office on the 24th?

A. Right. He filed it, I think, probably because he was out there getting some sort of treatment.

Q. Was there any statement submitted in support of the claim?

A. No.

Q. It was just a simple two-page form; right?

A. Right.

* * * * *

[93] Q. Then there is a letter here dated December 9, 1982, to the veteran requesting medical records and so on and other information?

A. Yes. Sometimes if we can't get the medical records, we ask the veteran if he has them. Oftentimes the retirees, when they get out of the service, will either take their originals or take a copy. And sometimes we can get them from the vet.

Q. Then we have another statement in support of claim dated 12/9/82?

A. Right.

Q. That's responding to your letter of December 9, 1982?

A. He says, I don't have them, but I wish I did.

Q. A fairly prompt response, I would say.

A. Yes. Well, then I told him to request his naval service medical records from World War II. And I told him to [94] follow up on the radiation exposure at Desert Rock.

* * * * *

[95] Q. Do you have any person permanently assigned to the San Francisco Regional Office who is an expert on radiogenic diseases?

A. No. We have two doctors, one who is an internist and one who is a retired renal specialist, a surgeon. Other than that, we have no special skills.

* * * * *

[97] Q. Do you ever get any information upon which they based this reconstructed dose?

A. Well, as I said before—I told you all I knew before.

Q. They don't ever explain to you how they arrived at that figure?

A. I don't recall ever seeing one. Well, I do have a vague recollection of them saying, "Well, other men in the unit were exposed to these amounts." So the maximum amount the veteran could have received had to be the highest of these, which was equal to one X-ray.

Q. And that's again external gamma radiation; right?

A. I don't know.

* * * * *

[100] Q., I see. But my questions have to go to the question of whether you would expect, assuming an exposure, a radiogenic disease such as leukemia or cancer to manifest itself within one year. My question is, you would not expect that?

A. No, I wouldn't. But I would expect to see—from what little I know about the sound medical principles involved, I would expect to see large amounts of radiation exposure during service.

* * * * *

[102] [Q.] The next area I would like to go in a little bit is post-traumatic stress. First of all, what kind of workup do you do as a rating board member or direct the action toward in cases of post-traumatic stress?

A. Well, generally the veteran files a claim, and usually he attaches a little statement that says, "I was in Viet Nam, and I was in combat, and I have flashbacks and nightmares, and I think I have post-traumatic stress."

* * * * *

[103] Q. What are the peculiar problems that you have identified, if any, with regard to proof or winning a post-traumatic stress case?

A. Well, the important thing to me is that since the veteran is now 10 or 15 years out of service, we want to document that he actually had a stressor, a psychological trauma during service, such as would produce in most people a post-traumatic stress reaction.

It's very easy if the veteran was in combat. If he had a CIB, a combat infantry badge, or a combat medic badge, if he was wounded, that's a stressor.

[104] Q. Okay.

A. The hard cases are the guys who were truck drivers, the guys who were MP's in Saigon. These cases are more difficult to identify the stressor.

Q. As a matter of practice, is an effort made to identify and interview soldiers who were present with the veteran at the time of the claimed stressful event?

A. Well, not to my knowledge. However, we recently received a memo from Central Office wherein we were supposed to find out in one particular case who the alleged buddies of the veterans were that were killed. And then we were supposed to go to the military and find out if indeed they had been killed, as the veteran alleged.

* * * * *

[105] MR. BLECKER: What if the veteran was unable to come up with evidence of his other troops that experienced his experience and basically you essentially had just the veteran's word and military records that, in your mind, did [106] not confirm or refute his experience? How would you resolve that?

THE WITNESS: Well, this is the usual case. It is the rare veteran, including myself, who can possibly remember the name of anyone he served with 10 or 15 years ago, other than nicknames.

The law contemplates the idea of a reasonable doubt. The evidence need only establish a reasonable doubt, that is, a probability of entitlement. We don't have to establish entitlement to a moral certainty. If you have a diagnosis and

you have the veteran alleging various trauma and you have done everything that you can to document or disprove, then you finally must make a decision, and it's on the basis of reasonable doubt versus possibility.

I have seen cases go both ways. I have seen the BVA uphold and deny. It's a very complex question.

* * * * *

[108] Q. Have you had any cases in recent memory where you have rated a case and the Board of Veterans Appeals has vacated your rating that you can recall?

A. Do you mean where I have denied service connection?

Q. No. Where you have granted service connection.

A. And they have taken it away?

Q. No. Where you rated the case, and they have taken away the rating, saying that the rating should be different or higher.

A. Higher?

Q. Yes.

A. Well, I am certain that's happened. You see, we [109] get shifted around every six months, and by the time our cases get to the BVA, we're some place else in the building, and when they come back, we don't often see them.

Q. There is no system for review locally based upon the cases that are sent back by the Board of Veterans Appeals so you find out about them and find out the basis for it and so on?

A. Well, if it's other than a routine case of some special interest, then sometimes I have seen cases photocopied and sent around so everybody could look at them. If you're on a board, generally you see the cases that are interesting that come back that were resolved on that board.

In the past I have made an effort to go and get the files after they come back, but I only do that rarely.

* * * * *

[127] Q. Most of the veterans who lose on the initial decision level do not pursue the case any further. Isn't that correct?

A. I understand there are statistics that the Board of Veterans Appeals publishes which shows the number of Notices of Disagreement. I understand that it is rather small. That has been my experience. I might do 50 ratings and get two Notices of Disagreement. Those are just numbers off the top of my head. But that really doesn't consider how many we grant. You know, no one appeals the favorable decisions. So you have to look at it in terms of the denials and reductions.

* * * * *

[129] Q. Now, how much time credit do you get as an end product code for doing an initial workup on a compensation case?

A. We have to keep track of the number of dictated ratings that we do, and we just mark them down. Each dictated rating is worth one hash mark, and we get so many points. I think it's six points. It doesn't matter whether we spent three days on the rating or two minutes. They are of equal value in terms of the statistics kept by management.

Q. And similar point credits are in effect for other types of action taken by adjudication personnel—for example, preparing a Statement of the Case?

A. Yes. When we do a Statement of the Case, we mark that down, and we get ten points for that.

We're supposed to generate 5.5 points per hour. That would be approximately one dictated rating an hour.

Q. So you're encouraged to work at a rather methodical speed by this system; is that correct? For instance, if you spent ten hours doing one particular rating, you would feel you were behind?

A. Well, in order to meet the minimal accepted requirements for the job, you have to do 5.5 points per hour.

Q. What happens if you don't meet the minimum?

[130] A. Then they say your performance is unacceptable.

* * * * *

[131] Q. Well, have you ever heard anybody express the thought that the credits are inadequate to allow the proper performance of the particular tasks?

A. I don't really recall any specific instance. I'm sure that it has come up.

Q. You have heard that opinion expressed, but you can't recall any specific instances? Is that right?

A. I have no recollection of anyone actually saying those words or having that intent.

Q. What about words to that effect?

A. It is my own personal opinion that it is ludicrous to have such production standards. But they exist, and there is nothing that I can do about it, and so I live within the system.

* * * * *

[134] Q. What types of claims do you consider complex, require more work?

A. Well, the PTS cases are hard. Some of the POW cases are hard. The radiation cases are hard. The initial applications by retirees, when we get out of the service, they always have a lot of disabilities. So, you know, you might have to rate 10 or 15 different disabilities.

* * * * *

Q. Now, in your capacity as a rating specialist—and I want you to limit your answer to just based upon your own position within the Veterans Administration—can you see any disadvantages in the performance of your duties that would result from elimination of the fee limitation?

A. No.

Q. Do you see any advantages? For instance, more workup on the files because attorneys would do the work?

A. Well, you have stated the obvious. I would agree with that. The cases that we get from the Swords to [135] Plowshares have a nice brief with all the evidence. It's much easier.

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